[redacted]

(25,019)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 736.

MUNICIPAL SECURITIES CORPORATION, PLAINTIFF IN ERROR,

vs.

KANSAS CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1915.

1 The Writ of Error is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of thet Supreme Court of the State of Missouri, Greetings:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, at the April Term 1915 thereof, between Municipal Securities Corporation, Respondent, and Kansas City, Appellant, a manifest error has happened to the great damage of said Respondent, as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be there given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct said error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 13th day of November, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

2 Issued at the office, in the City of Jefferson, with the seal of the District Court of the United States for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States District Court, Western District of Missouri, Western Division.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Western District of Missouri, Central Division.

Allowed by—
A. M. WOODSON,
Chief Justice Supreme Court of Missouri.

2½ [Endorsed:] Municipal Securities Corporation vs. Kansas City. Writ of Error. Filed Nov. 13, 1915. J. D. Allen, Clerk.

3 Which said Petition for Writ of Error is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, In Banc.

No. 16831.

MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Petition for Writ of Error.

Now comes Municipal Securities Corporation, plaintiff and respondent in the above entitled cause, and shows to this honorable court that on or about January 22, 1910 a judgment was duly rendered and entered in the said cause by the Circuit Court of Jackson County, Missouri, in favor of the plaintiff and against the defendant for the sum of $3,924.42, and the establishment of liens for that sum against certain tracts of real estate; that the defendant duly prosecuted an appeal from the said judgment and said appeal was heard and determined in this court on or about June 1, 1915, and this court thereupon ordered and adjudged that the said judgment be reversed.

Respondent further shows to the court that in its petition in the said cause, and in its declaration of law presented and allowed by the said Circuit Court of Jackson County, Missouri, and in its briefs and arguments and in its motion for a rehearing filed in this court, it expressly set up and claimed, rights, titles and privileges under
the Fourteenth Amendment to the Constitution of the United
4 States, and particularly that part thereof which declares that no state shall deprive any person of his property without due process of law, which claims and asserted Federal rights were by this court denied; and respondent says that it herewith presents and files with this petition and as a part thereof its Assignments of Error, which it will assert and upon which it will rely in the prosecution of its writ of error in the Supreme Court of the United States upon the record, proceedings and judgment in this cause.

Wherefore, respondent prays that a writ of error may issue to the end that it may bring up for review before the Supreme Court of the United States the record, proceedings and judgment in this cause.

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Respondent.

4½ [Endorsed:] No. 16831. Municipal Securities Corporation vs. Kansas City. Petition for Writ of Error. Filed Nov. 13, 1915. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

5 Which said Citation is in words and figures as follows, to-wit:

In the Supreme Court of the United States.

MUNICIPAL SECURITIES CORPORATION, Plaintiff in Error,
vs.
KANSAS CITY, Defendant in Error.

The United States of America to Kansas City, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C. not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Missouri, wherein Municipal Securities Corporation is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. M. Woodson, Chief Justice of the Supreme Court of Missouri, this 13th day of November, in the Year of our Lord, One housand Nine Hundred and Fifteen.

A. M. WOODSON,
Chief Justice.

6 UNITED STATES OF AMERICA,
Supreme Court of Missouri, ss:

We hereby acknowledge due service of the within citation this 15th day of November, A. D. 1915.

ARTHUR F. SMITH,
Attorney for Defendant in Error.

6½ [Endorsed:] Municipal Securities Corporation vs. Kansas City. Citation. Filed Nov. 13, 1915. J. D. Allen, Clerk.

7 Which said Assignment of Errors is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, in Banc.

No. 16831.

MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Assignments of Error.

The Municipal Securities Corporation, the respondent and plaintiff in the above entitled cause, will in the prosecution of its writ of error in the Supreme Court of the United States upon the record, proceedings and judgment in this cause, assert and rely upon the following Assignment of Errors.

The Supreme Court of Missouri in ruling this cause erred in the following respects:

1. In reversing and annulling the judgment of the Circuit Court of Jackson County, Missouri, in favor of the plaintiff and against the defendant, and thereby deciding against the title and right expressly set up and claimed by the plaintiff in its petition in this cause, and in the declarations of law presented and allowed by the trial court, and in its brief and argument and its motion for rehearing filed in the Supreme Court in the State of Missouri, to the effect that, upon the facts pleaded and proved as disclosed by the record, Kansas City, a municipality and agency of the State of Missouri, had
8 deprived the plaintiff of its property without due process of law, contrary to the declarations of the Fourteenth Amendment to the Constitution of the United States to the effect that no state might deprive a person of his property without due process of law, and was liable to make just compensation therefor.

2. In holding, determining and adjudging that the judgment rendered and entered by the Circuit Court of Jackson County, Missouri, in this cause in favor of the plaintiff and against Kansas City, the appellant, was not supported by the pleadings and proof and was erroneous, and in reversing and annulling the said judgment, when in so doing they denied the assertion of the plaintiff that its right and property in and to the subject matter of the suit, viz., certain special tax bills were, by the undisputed facts disclosed by this record, shown to have been taken from it by Kansas City and the State of Missouri without making any compensation therefor, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States against depriving a person of property without due process of law.

3. In denying the claim of Federal right expressly set up in the plaintiff's petition in the said cause to the effect that defendant Kansas City became and is liable to pay the amount due on certain tax bills because Kansas City by its own acts and conduct not consented to by the plaintiff, did by administrative and judicial proceedings in the nature of condemnation proceedings, destroy the plaintiff's right to collect the cost of certain public work according to its own contract therefor and to enforce the lien of certain tax bills issued pursuant to such contract by taking possession of the real estate affected by such liens and devoting the same to a public use and did thereby deprive plaintiff of its property in such special tax bills, contrary to the Fourteenth Amendment to the Constitution of the United
9 States guaranteeing to the plaintiff the protection of its property by due process of law and as against the acts of states.

4. In denying the claim of Federal right expressly asserted by the plaintiff in its declaration of law requested and given by the Circuit Court of Jackson County, Missouri, to the effect that if the lands described in the several special tax bills in evidence were at the time of their issuance, to-wit, March 15, 1902, owned and were in the possession of certain individuals, and that the said special tax bills became and were when issued valid liens against the tracts of land therein respectively described, and that thereafter Kansas City, the

defendant, under and by virtue of the ordinances and court proceedings in evidence acquired the said lands and took possession thereof and devoted the same to a public use, and so deprived the plaintiff of the power in the state courts of enforcing such special tax bills, then the said city contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States did deprive the plaintiff as owner of such certificates or tax bills of its property rights therein and the finding should be for the plaintiff.

5. In denying the claim of Federal right expressly asserted by the plaintiff in its declaration of law requested and given by the Circuit Court of Jackson County, Missouri, to the effect that this is an action at law wherein and whereby the plaintiff claims and asserts that the defendant, Kansas City, a municipal corporation organized and existing under and by virtue of the laws of Missouri, and as an agency of said state, has by its official acts, ordinances and conduct appropriated to public use the property and property rights of the plaintiff, which property rights consisted of valid, subsisting liens against certain real estate of the value of more than $5,000, without making just compensation, or any compensation therefor, and has thereby deprived the plaintiff of its said property without due process of law, and contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, and especially that part thereof inhibiting states from depriving a person of his property without due process of law.

6. In holding, determining and adjudging in effect that special tax bills duly issued by the defendant Kansas City evidencing valid liens for a stated sum of money against certain real property and which were delivered and used by Kansas City to satisfy and discharge its obligation under a valid contract with the contractor for a public improvement, and which tax bills were accepted by such contractor for that purpose, might by subsequent acts and subsequent conduct of that city, not consented to by the lien holder, be rendered nugatory and the lien thereof be extinguished by the act of the said city in taking possession of the real property affected by the liens and devoting the same to a public use with the effect that under the laws and public policy of Missouri, which do not permit the sale of property devoted to a public use, such special tax liens could not be enforced against such real estate, and such special tax bills were thereby rendered valueless without making any compensation therefor to the owner, and in holding and adjudging that there was no merit in the claim expressly set up by plaintiff that such acts of the State of Missouri and Kansas City, an agency of such state, did by this means deprive it of its property in such tax bills and in the lien thereof, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States to the effect that no state shall deprive any person of his property without due process of law.

7. In not sustaining the respondent's claim and invocation of the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and as against the acts of the State of Missouri and Kansas City, its agency, in the protection of its property and

property rights in the certain special tax bills issued by Kansas City and the lien thereof mentioned in the plaintiff's petition, and in adjudging that altho the said tax bills were rendered non-enforcible by the acts of Kansas City the plaintiff nevertheless was not deprived of its property without due process of law contrary to such constitutional guarantee.

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Respondent.

(Filed November 13, 1915. J. D. Allen, Clerk.)

11½ [Endorsed:] No. 16831. Municipal Securities Corporation vs. Kansas City. Assignments of Error. Filed Nov. 13, 1915. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

12 *Appellant's Abstract of the Record.*

May 20, 1909, plaintiff filed its amended petition and stipulation with defendant in the Circuit Court of Jackson County, Missouri, at Kansas City, which petition and stipulation, omitting caption and signatures, is in words and figures as follows:

Amended Petition.

First Count.

Now comes plaintiff and for cause of action against defendant alleges that plaintiff is a corporation duly organized and existing under the laws of the state of Missouri, and the defendant is a municipal corporation duly organized and existing under the constitution and laws of the state of Missouri;

That by an Ordinance of Kansas City, No. 16219, entitled, "An ordinance to establish and cause to be constructed a district sewer in sewer district No. 146," approved January 24th, 1901, said defendant, Kansas City, provided that a district sewer should be constructed in sewer district No. 146 in said Kansas City as designated by said ordinance.

13 Plaintiff alleges that bids for doing the work provided for by said ordinance were duly advertised for by said Kansas City and a contract was duly entered into with Michael Walsh to construct the said sewer, he being the lowest and best bidder therefor.

Plaintiff alleges that pursuant to said contract and ordinance said Michael Walsh constructed the sewer provided for by said ordinance and that by the terms of said contract and ordinance said sewer was to be paid for by special taxbills against the real estate within the said sewer district 146, as provided by the charter of Kansas City.

Plaintiff alleges that Lot 1, Block 1, C. H. Pratt's Vine Street Addition is located within said sewer district No. 146 and that at the

time said work was done and tax bills therefor were issued, the owner of said property held the same subject to certain proceedings to condemn said lot for a public park-way in the South Park District in Kansas City, Missouri, known as the "Pasco Extension," under ordinance No. 13067, entitled, "An ordinance to open and establish a public parkway in the South Park District in Kansas City, Missouri," approved October 3, 1899. That by said ordinance last mentioned it was ordained that said Lot 1, Block 1, and other property should be condemned for the purpose of a public parkway. That under said ordinance proceedings were begun in the Circuit Court of
14 Jackson County, Missouri, for the condemnation of land described in said ordinance as required by law. The owners of said lands at the date said condemnation ordinance was enacted were properly made parties to the proceedings and a hearing was had to determine the value of the property taken and a verdict in said case was rendered, in the Circuit Court of Jackson County, Missouri, on the 4th day of June, 1901.

Plaintiff alleges that motions for a new trial were filed in said cause, which were duly overruled and said verdict was duly confirmed and judgment was rendered in said cause on the 14th day of September, 1901, by said circuit court.

The plaintiff further alleges that said cause was appealed to the Supreme Court of the State of Missouri, October 4th, 1901, and that upon said appeal said judgment of the Circuit Court was suspended until affirmed by the Supreme Court, and was so affirmed June 4th, 1902; and that subsequently to that date said Kansas City paid for and took possession under said condemnation proceedings of Lot 1, Block 1, C. H. Pratt's Vine Street Addition as a public park and now holds the same as such.

Plaintiff alleges that while said condemnation case was pending upon appeal in the Supreme Court, said Michael Walsh com-
15 pleted the work under his contract for the construction of district sewers in sewer district No. 146 under said Ordinance No. 16219; and that the Board of Public Works of said city thereupon ascertained the share of the cost of said work for which the said lot and the owner thereof and the said city were justly liable, and the said board certified the said amount both upon its records and by a certificate or taxbill which it then issued to said Walsh on March 15th, 1902, in payment of the proportionate share of the cost of the work of constructing said sewer chargeable to or on account of said lot as provided by law. That the said certificate or taxbill was No. 84 and was issued against Lot 1, Block 1, C. H. Pratt's Vine Street Addition for the sum of Forty-three Dollars and Twenty Cents ($43.20), being the proportionate part of the cost of the said sewer required to be paid on account of said lot under the charter of Kansas City.

Plaintiff alleges that for valuable consideration, said Michael Walsh heretofore sold and assigned said certificate or special taxbill to this plaintiff, who is now the owner and holder of the same, which is hereto attached, herewith filed and made a part of this petition.

Plaintiff alleges that it is advised by counsel and believes, and

therefore charges the fact to be, that by reason of the prior judicial determination of the value of said property and the judgment of condemnation thereon, in said condemnation proceedings said
16 taxbill never became a lien upon the value of said lot awarded to the owner thereof, in said condemnation proceedings, but that upon the final determination of said condemnation case, the defendant, Kansas City, became and is liable to pay said amount of the said certificate or taxbill with interest thereon, and that Kansas City can not by an act of itself not consented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy the plaintiff's right to collect the cost of the said work according to its said contract, and in support of this claim the plaintiff invokes the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and as against the acts of states.

Plaintiff alleges that prior to the commencement of this action it offered to surrender to the Board of Public Works and to Kansas City, said certificate or taxbill issued as aforesaid if the said city or said board should believe and hold that the said certificate or taxbill was not a certificate of said Board of Public Works conformable to the provision of Section XIV, Article IX of the charter of Kansas City, and to accept in lieu thereof such a certificate as is provided for by said Section 14, but said city and said board refused to accept the same or issue a new certificate in lieu thereof and denied all liability for the said charge.

17 Plaintiff states that defendant has failed to pay the amount of said certificate or taxbill, although payment thereof was demanded March 15, 1902.

Plaintiff alleges that by reason of failure to pay said certificate or bill, or any part thereof, and by reason of its action in the premises, plaintiff is entitled to recover of defendant the amount so certified by said board as lawfully chargeable against said lot with interest as therein provided at the rate of ten per cent per annum.

Wherefore, plaintiff asks judgment against defendant for the sum of Forty-three Dollars and Twenty Cents ($43.20) with interest from March 15, 1902, at the rate of ten per cent per annum and for costs of this action.

Stipulation.

The plaintiff having obtained leave to amend its petition herein, and each count thereof, said petition consisting of 75 counts, the allegations of which as to general terms being substantially the same, and the plaintiff having filed an amended petition herein as to the first count, which said amended petition is hereto attached and herewith filed:

It is hereby stipulated and agreed that each of the counts
18 of the original petition shall be taken, held and considered to have been amended as to all general allegations, that is, as to all allegations which are common to each count so as to be of the same force and effect as the said amended petition as to the first count

without writing or filing additional pleadings or counts and thereby encumbering the record; it being understood that the allegations of the counts of the original petition from 2 to 75, inclusive, as to the description of the property affected, and the description and the amount of the certificate or taxbill therein referred to and the amount of the judgment sought to be obtained and enforced shall be the same in the said counts as hereby amended as stated in those counts of the original petition.

It is further agreed that the defendant does not waive any defense to the alleged causes of action by entering into this stipulation, and that defendant may file an answer or other pleading directed to the first count in the said amended petition and that such petition or pleading shall be taken to apply to all counts of the answer with the same effect as though its allegations were reiterated as to all such counts.

Thereafter, on January 10, 1910, defendant filed its amended answer to plaintiff's amended petition, which amended answer, omitting caption and signature, is in words and figures as follows:

Amended Answer.

Comes now defendant, Kansas City, and for its amended answer to plaintiff's amended petition admits that it is a municipal corporation duly organized and existing under the laws of the State of Missouri, but denies each and every other allegation in said amended petition contained, except as herein stated.

19 For further answer to plaintiff's amended petition defendant states that on the 15th day of March, 1902, it did issue to Michael Walsh special tax bill No. 84 on Lot 1, Block 1, C. H. Pratt's Vine Street Addition, and the other special tax bills mentioned in the petition herein, and that said Michael Walsh, on the 15th day of March, 1902, did execute and deliver over to Kansas City a full and complete release on account of any claim arising from said special tax bill No. 84 on Lot 1, Block 1, C. H. Pratt's Vine Street Addition, and from all the said tax bills mentioned in the petition herein, as provided for in Section 16, Article IX of the charter of Kansas City.

Defendant further states that the charter of Kansas City, Article IX, Section 14, provides a method by which Kansas City shall pay its share of the cost of any public improvement on land owned in fee simple by it, and said charter provides that the same shall be done by the issuance of tax certificates after the City's proportion of the cost shall have been ascertained and certified to by the Board of Public Works; that no certificate was issued by defendant on Lot 1, Block 1, C. H. Pratt's Vine Street Addition, or on any of the other lots described in the petition herein; that the Board of Public Works did not ascertain and certify an amount due; that it did not find that Lot 1, Block 1, C. H. Pratt's Vine Street Addition or any other of the said lots mentioned in the petition, was owned in fee simple absolute

by Kansas City; that there was no compliance with Article IX, Section 14, of the Charter of Kansas City, and no obligation created thereunder.

Wherefore, defendant prays that it may go hence without day and have judgment for its proper costs therein expended.

20 Thereafter on January 10, 1910, the plaintiff filed a reply in which it denied each and every allegation in defendant's amended answer.

Trial.

January 10, 1910, during the January Term, 1910, of said court, the case came on for hearing and a jury being waived the case was tried before the court.

Finding and Judgment.

January 22, 1910, during the January term, 1910, of said court, the court found the issues in favor of the plaintiff and against the defendant on each count, the aggregate of which was $3,924.42, and assessed the damages in favor of plaintiff and against defendant in the sum of $3,924.42.

Motions for a New Trial.

Thereafter on January 25, 1910, during the said January Term, 1910, of said court and within four days after said finding and judgment, defendant filed its motion for a new trial. Said motion is hereinafter set out in the bill of exceptions and is hereby adopted and made a part of this abstract of the record as though printed in full at this place.

21 January 29, 1910, during said January Term, 1910, of said court, said motion for a new trial was submitted to the court and upon due consideration, by an order duly entered and made of record, was, upon January 29, 1910, during said January Term, 1910, of said court, by the court overruled; to which action of the court in overruling defendant's said motion for new trial the defendant at the time excepted and still excepts.

Appeal.

March 22, 1910, and during the said January Term, 1910, of said court, defendant filed its application and affidavit for an appeal to the Kansas City Court of Appeals, which appeal was upon March 22, 1910, by an order duly entered and made of record allowed as prayed to the Kansas City Court of Appeals.

The cause was duly transferred by the Kansas City Court of Appeals to the Supreme Court of Missouri on the ground that a constitutional question was involved.

Thereafter, on March 17, 1911, during the January Term, 1911, of said circuit court and within the time allowed by the court therefor, said Bill of Exceptions was presented to and signed, sealed and allowed by the judge of said court, he being the judge who tried said cause, and by an order duly entered of record on said date, said Bill of Exceptions was allowed and was ordered to be and was filed and made a part of the record in this case.

Said Bill of Exceptions, omitting caption, and signatures, is in words and figures as follows, to-wit:

22 *Bill of Exceptions.*

Be it remembered, that on Monday, the 10th day of January, 1910, and at said January Term, 1910, of said Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 3 thereof, the above-entitled cause coming on to be heard before the Honorable Thomas J. Seehorn, Judge of said court, a jury having theretofore been duly waived, the plaintiff appearing by its attorneys, Messrs. Scarritt, Scarrit & Jones and Mr. W. R. James; and the defendant appearing by its attorneys, Mr. James W. Garner and Mr. E. J. Shannahan, the following proceedings were had, to-wit:

The plaintiff, to sustain the issues upon its behalf, then offered evidence oral and documentary in the words and figures following:

Mr. Garner: We object to plaintiff offering any evidence under this petition on the ground that the petition does not state facts sufficient to constitute a cause of action—that it is a suit against the city, based upon a special tax bill.

The Court: It will be overruled.

To which ruling and action of the court the defendant by its counsel then and there duly excepted.

23 Mr. Scarritt: Plaintiff offers in evidence Ordinance No. 16219 of Kansas City, Missouri, approved January 24th, 1901, entitled, "An ordinance to establish and cause to be constructed a district sewer in sewer district No. 146."

Said Ordinance No. 16219 so offered in evidence, in part, is in the words and figures following, to-wit:

"SECTION 3. That special tax bills be issued for the work of improvements herein provided for, and shall be made payable in four equal installments, payable and collectible and in all respects in compliance with the provisions of Section 23, Article IX of the charter of Kansas City."

Mr. Scarritt: We offer in evidence the contract between Kansas City and Michael Walsh for the construction of sewers in Sewer District No. 146, dated February 28th, 1901.

Said contract so offered in evidence is in part in the words and figures following, to-wit:

SECTION 12. General Stipulations. "It is further agreed that the passage of the ordinance herein above referred to and the doing of the work embraced in this contract without any proper petition of the Common Council from the real estate owners to have said work

done, shall not render the city liable to pay, directly or indi-
24 rectly, for such work or any part thereof otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills and take the same without recourse against Kansas City in any event."

"SECTION 15. And the said party of the first part further agrees that he will not be entitled to payment for any portion of the aforesaid work or materials, until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction of the City Engineer, and that he will then receive pay according to the above schedule of prices in certified bills of assessments of special taxes against and upon the lands in said sewer district, as provided by law, and that his receipt therefor shall be in full of all claims against the city on account of said work."

"SECTION 16. * * * That special tax bills be issued for the work of improvements herein provided for and shall be made payable in four equal installments payable and collectible and in all respects in compliance with the provisions of Section 23, Article IX of the charter of Kansas City."

Mr. Scarritt: We now offer in evidence Ordinance of Kansas City, No. 16664, entitled—"An Ordinance to confirm contract with Michael Walsh," etc.

Said Ordinance No. 16664 so offered in evidence is in the words and figures following, to-wit:

25 An Ordinance to Confirm Contract with Michael Walsh for the Construction of Sewers in Sewer Districts No. 146, as Provided by Ordinance No. 16219.

Be it ordained by the Common Council of Kansas City:

SECTION 1. That the work provided for in the written contract dated Feb. 28, 1901, and entered into by Michael Walsh, as principal, and The U. S. Fidelity & Guaranty Co. of Baltimore and Joseph Schtoll of Kansas City, Mo., as securities, with Kansas City, to do the work to be done according to Ordinance No. 16219, entitled, "An ordinance to establish and cause to be constructed district sewers in sewer district No. 146," approved January 24, 1901, be executed according to plans and specifications mentioned in said contract, and that said contract be and the same is hereby confirmed, said principal being the lowest and best bidder for doing said work.

Approved April 22, 1901.

JAS. A. REED, *Mayor.*

Attest:
C. S. CURRY,
[SEAL.] *City Clerk.*

Mr. Garner: Now, we object to this contract between Kansas City and Michael Walsh, for the reason that it is incompetent and immaterial and does not tend to establish any liability against Kansas City under the allegations in this petition. This case being tried before the court, we will have the same general objection as to all these pro-

ceedings, and, it won't be necessary to repeat the objections as to all of them.

The Court: You are making up your own record, Mr. Garner. You will have to assume the responsibility of all that. What is the general theory of that objection?

26 Mr. Garner: It is the one already made. It does not tend to prove that it created any liability on the part of the city, whatever.

The Court: The contract provides for the payment of the work in special tax bills?

Mr. Garner: Yes, sir.

The Court: The objection will be overruled.

To which ruling and action of the court the defendant by its counsel then and there duly excepted.

Mr. Scarritt: We next offer in evidence document No. 127 of the records of the Board of Public Works of Kansas City, Missouri, entitled, "Estimate for district sewer in Sewer District No. 146—Michael Walsh, contractor"—dated "March 3, 1902."

Mr. Scarritt: We now offer in evidence, from official Record No. 9 of the Board of Public Works, at page 153, item No. 10035 and item No. 10036, reading as follows: "The City Engineer certifies that the following contracts have been completed and are ready for acceptance and payment in special tax bills." That language ends at "10035." 10036 reads:—"Ordinance No. 16219, sewers in Sewer District No. 146—Michael Walsh—$71,521.32." Both are dated March 7, 1902.

27 And from the same record, same page and under same date, we offer item No. 10045, reading as follows: "The Board of Public Works certifies that it has computed the cost of constructing sewers in sewer district No. 146, as provided by Ordinance No. 16219, approved January 24, 1901." Then follows the particular list of the quantities of the several kinds of work done, and the price.

Mr. Garner (Interrupting.) Let the ordinance speak for itself, what it shows.

Mr. Scarritt: Being a total of $71,521.32.

Said items No. 10035, No. 10036 and No. 10045, page 153 of Record No. 9 of the Board of Public Works of Kansas City, Missouri, so offered in evidence, are in the words and figures following, to-wit:

10035—The City Engineer certifies that the following contracts have been completed and are ready for acceptance.

10036—Ordinance No. 16219, Sewer in Sewer District No. 146, M. Walsh, $71,521.32.

No. 10045.

The Board of Public Works certifies that it has computed the grade of:—

Constructing District Sewers in Sewer District No. 146, as provided by Ordinance No. 16219, approved January 24th, 1901.

28

310 3-10 lin. ft., 3 ft. 8 in. Brick Sewer @ $4.40 per lin. ft.	$1,409.32
157 5-10 lin. ft., 3 ft. 6 in. Brick Sewer @ 3.70 per lin. ft.	582.75
455 1-10 lin. ft., 3 ft. 0 in. Brick Sewer @ 3.25 per lin. ft.	1,479.02
373 5-10 lin. ft., 2 ft. 10 in. Brick Sewer @ 3.25 per lin. ft.	1,213.87
145 8-10 lin. ft., 21 in. Pipe Sewer @ 1.50 per lin. ft.	218.70
1536 2-10 lin. ft., 24 in. Pipe Sewer @ 2.40 per lin. ft.	3,686.88
391 2-10 lin. ft., 27 in. Pipe Sewer @ 3.00 per lin. ft.	1,173.60
13733 4-10 lin. ft., 8 in. Pipe Sewer @ 0.70 per lin. ft.	9,613.38
98 Catch Basins @ $20.00 each	1,960.00
105 Manholes @ $38.00 each	3,990.00
300 cu. yds. Stone Masonry @ $3.00 per cu. yd.	900.00
9980 6-10 cu. yds. Rock Excavation @ $3.00 per cu. yd.	29,941.80
1 Lamp Hole @ $6.00 each	6.00
15 Flush Tanks @ $65.00 each	975.00
2695 4-10 lin. ft. of 12 in. Catch Basin Conn. @ $0.70 per lin. ft.	1,886.78
2329 8-10 lin. ft. of 15 in. Sewer Pipe @ $0.75 per lin ft.	1,747.35
133 lin. ft. of ½ in. Galvd. Water Pipe @ $0.35	46.55
3235 7-10 lin. ft. of 18 in. Sewer Pipe @ $1.20	3,870.84
7629 lin. ft. of 12 in. Sewer Pipe @ $0.70	5,340.30
13925 feet Lumber (B. M.) @ $20.00 per 100 ft.	278.50
Total amount for extra work ordered by City Engineer, as per statement filed on estimate	1,200.63
	$71,521.32

Mr. Scarritt: We now offer in evidence document No. 417 of the records of the Board of Public Works, entitled—"Order of Board of Public Works to issue special tax bills," under this proceeding.

Said document No. 417 of the Board of Public Works, so offered in evidence, is in the words and figures following, to-wit:

No. 10035.

Board of Public Works,

Department of Engineering.

KANSAS CITY, MO., Mar. 7, 1902.

The following contracts have been completed, and are ready for acceptance and payment in special tax bills.

29 *Description of Work.*

No. of ordne.	Nature.	Location.	Name of contractor.	Cost.
16219.	Sewers.	In Sewer District No. 146.	M. Walsh.	$71,521.32.

I certify that the above work has been completed in accordance with the specifications, and recommend the acceptance of the work, and know of no reason why the tax bills should not be issued.

ROBERT W. WADDELL,
City Engineer.

The City Engineer will please accept the above work and issue the special Tax Bills in payment therefor.

By order of the Board of Public Works.

GEO. M. SHELLEY, *President.*

Attest:

HARRY B. WALHER, *Secretary.*

30 Mr. Scarritt: We now offer from the official record of the proceedings of the Board of Public Works, page 155, under the date of March 7th, 1902, item No. 10057, reading as follows: "The Board of Public Works certifies that it has apportioned the cost of this work of constructing a district sewer in Sewer District No. 146, as provided by Ordinance No. 16219, approved January 24, 1901, showing the cost of $71,521.32."

And also from the same record, and from the same page and under the same date, item No. 10069, reading as follows: "The Board of Public Works certifies that it has computed the cost on the following work and apportioned the same among the several lots and parcels of land to be charged therewith, charging each lot or parcel of land with the proper cost; said apportionment is now certified to the City Treasurer; the tax bills according to said apportionment are made out, certified and registered, and the City Engineer is ordered to deliver them to the party in whose favor made out for collection, and then take the receipt of such party therefor. Constructing district sewers in Sewer District No. 146."

31 Said items No. 10057 and *and* No. 10069, page 155 of the Official Record of the Proceedings of the Board of Public Works, under date of March 7th, 1902, so offered in evidence, are in the words and figures following, to-wit:

10057—The Board of Public Works certifies that it has apportioned the cost of this work of:

Constructing a district sewer in sewer district No. 146 as provided by Ordinance No. 16219, approved January 24, 1901, $71,521.32.

10069—The Board of Public Works certifies that it has computed the cost of the following work and apportioned the same among the several lots and parcels of land to be charged therewith, charging each lot or parcel of land with its proper share of such cost; said apportionment is now certified to the City Treasurer; the tax bills therefor, according to such computation, apportionment and charge, are made out, certified and registered, and the City Engineer is ordered to deliver them to the party in whose favor made out for collection and then take the receipt of such party therefor.

Construction district sewers in Sewer District No. 146.

Mr. Scarritt: We now offer in evidence from the records of the Board of Public Works, the original apportionment sheets
32 apportioning the cost of constructing district sewers in Sewer District No. 146, under Ordinance No. 16219, approved January 24, 1901—Michael Walsh, contractor—being document No. 127, and consisting of sheets numbered, respectively, from "1" to "64." Apportionment of special tax for constructing District Sew-

ers in Sewer District No. 146, under ordinance No. 16219, approved January 24th, 1901.

The Board of Public Works hereby certifies that it has apportioned the cost of the said work among the several lots and parcels of land to be charged therewith and charges each lot or parcel of land with its proper share of said cost, and that the following is the correct apportionment of such cost according to the area thereof: Tax Bill No. 84, against lot 1, Block 1, C. H. Pratt's Vine Street Addition, $43.20, owner's name B. Koenigsdorf." And then follows a similar recital as to each and every lot described in the several tax certificates or tax bills mentioned in the petition in this cause, and the amount of each apportionment and charge conforms to the amount found by the court as set out in the finding and judgment in this cause as recited in the Appellant's Abstract of Record on page 65 thereof. These apportionment sheets are duly signed and attested by the Board of Public Works.

Mr. Scarritt: From the same record—Official Record of the Proceedings, Board of Public Works, No. 9, at page 156, we offer in evidence item No. 9, at page 156, we offer in evidence item No. 10081, reading as follows: "The Board of Public Works certifies to the City Treasurer that the following work has been completed and the cost thereof apportioned, constructing district sewers in Sewer District No. 146, under Ordinance No. 16219, approved January 24, 1901—Cost, $71,521.32."

Said item No. 10081, page 156 of Official Record of Proceedings Board of Public Works, No. 9, so offered in evidence, is in the words and figures following, to-wit:

10081—The Board of Public Works certifies to the City Treasurer that the following work has been completed and the cost thereof apportioned:

Constructing district sewers in Sewer District No. 146, under Ordinance No. 16219, approved January 24th, 1901. $71,521.32.

33 Mr. Scarritt: We now offer in evidence the special certificates, or Special Tax bills designated in and filed with the original petition in this case—being seventy-five in number—together with the assignment of the said bills, on the back of each of them respectively.

A copy of one said Special Tax Bills so offered in evidence is in the words and figures following, to-wit:

STATE OF MISSOURI:

No. 84.

Ordinance No. 16219.

Kansas City Special Tax Bill.

Issued on the Installment Plan.

This certifies that the following described real estate in the corporate limits of Kansas City, County of Jackson, Missouri, as follows, to-wit: Lot 1, Block 1, C. H. Pratt's Vine Street Addition,

Has been charged with the sum of Forty-three ($43) Dollars and

Twenty (.20) cents, as a Special Tax for constructing a sewer in Sewer District No. 146, as provided by Ordinance No. 16219, of Kansas City, Missouri, entitled: "An Ordinance to establish and cause to be constructed a District Sewer in Sewer District No. 146," Approved January 24th, 1901. Said work has been completed according to contract by Michael Walsh, Contractor, to whom
34 this Special Tax Bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and not longer, unless within such year suit shall have been instituted to collect this tax bill, and notice of the bringing of such suit shall have been filed with the City Treasurer, in which case the lien of this tax bill shall continue until the termination of such suit, and until the sale of the property under execution on the judgment establishing the same and no default in the payment of any previous installment hereinafter mentioned, shall operate to diminish the period during which such lien shall continue.

This tax Bill is payable in four (4) equal installments of Ten Dollars and Eighty Cents each, on presentation of three (3) installment coupons hereto attached, at maturity thereof, the fourth and last installment of Ten Dollars and Eighty Cents, being payable on the 31st day of May, 1905, with interest thereon as herein mentioned, on the surrender and cancellation of this tax bill. This tax bill bears interest from the date of issue at the rate of seven (7) per cent. per annum, and when any installment becomes due and
35 collectible, as herein provided, interest thereon, and on all unpaid installments, shall be due and collectible to that date. If any installment of this tax bill, or interest thereon, be not paid when due, then all the remaining installments shall become due and collectible together with interest thereon at the rate of ten (10) per cent. per annum from the date of issue of this tax bill less the sum of any interest that may have already been paid on such installments. It is provided, however, that the owner of the property charged with the payment of this tax bill, or the owner of any interest therein, shall have the privilege of paying the same in full at any time before the expiration of thirty (30) days from the date of the issue hereof, without interest; and it is provided further, that the owner of the property charged with the payment of this tax bill, or the owner of any interest therein, shall have the privilege of paying this tax bill in full, at any time, by paying the interest thereon to a period of ninety (90) days after the date of such payment unless such payment is made within less than ninety (90) days of the maturity of the next installment and then by paying interest thereon to the date when the next installment becomes due and payable.

Given by authority of the Board of Public Works of Kansas City, Missouri, this day of March 15, 1902.

GEO. M. SHELLEY, *President*.
By EDWARD B. SILKWOOD.

36 Third Installment.

Issued for Ten Dollars and Eighty Cents, being one-fourth (¼) of Special Tax Bill No. 84 issued on the installment plan to Michael Walsh, Contractor, for constructing a District Sewer in Sewer District No. 146, as provided in Ordinance No. 16219 of the Common Council of Kansas City, approved January 24th, 1901.

This the Third Installment Coupon is due and collectible on the 31st day of May, 1904, and bears interest at the rate of seven (7) per cent. per annum from the date of issue.

Issued by Authority of the Board of Public Works this day of Mar. 15, 1902.

GEO. M. SHELLEY, *President*.
By EDWARD B. SILKWOOD.

Second Installment.

Issued for Ten Dollars and Eighty Cents, being one-fourth (¼) of Special Tax Bill No. 84 issued on the installment plan to Michael Walsh, Contractor, for constructing a District Sewer in Sewer District No. 146, as provided in Ordinance No. 16219 of the Common Council of Kansas City, approved January 24th, 1901.

37 This the Second Installment Coupon is due and collectible on the 31st day of May, 1903, and bears interest at the rate of seven (7) per cent. per annum from the date of issue.

Issued by Authority of the Board of Public Works this day of Mar. 15, 1902.

GEO. M. SHELLEY, *President*.
By EDWARD B. SILKWOOD.

First Installment.

Issued for Ten Dollars and Eighty Cents, being one-fourth (¼) of Special Tax Bill No. 84 issued on the installment plan to Michael Walsh, Contractor, for constructing a District Sewer in Sewer District No. 146, as provided in Ordinance No. 16219 of the Common Council of Kansas City, approved January 24th, 1901.

This the First Installment Coupon is due and collectible on the 31st day of May, 1902, and bears interest at the rate of seven (7) per cent. per annum from the date of issue.

Issued by Authority of the Board of Public Works this day of Mar. 15, 1902.

GEO. M. SHELLEY, *President*.
By EDWARD B. SILKWOOD.

38 Ordinance No. 16219.

B. P. W.—Form 107.

Kansas City Special Tax Bill.

Issued on the Installment Plan.

For Constructing a District Sewer in Sewer District No. 146.

Registered.

No. 520. For 22c.

Vol. 46, Page 46, in City Engineer's Office.

NOTICE.—This bill should be presented at the City Treasurer's office when receipted to have satisfaction entered on the record.

On the back of each of the taxbills sued on is the following endorsement: "Assignment. For value received — assign this Special Tax Bill and the lien thereof to Municipal Securities Corporation, and — authorize to sign — name — to the receipt. Michael Walsh."

39 Mr. Scarritt: The execution is admitted in the Answer, Your Honor. We offer the signature to the assignment on these Tax Bills.

Mr. Garner: Defendant admits the signature attached to the assignment on the Special Tax Bills introduced in evidence, as the signature of Michael Walsh. We know his signature.

CLARENCE S. PALMER, called as a witness on the part of the plaintiff, having been duly sworn testified as follows:

Direct examination by Mr. Scarritt:

Q. You are a practicing attorney of the bar here for a number of years, Mr. Palmer?

A. Yes, sir.

Q. Did you represent the Municipal Securities Corporation, the plaintiff in this case, along about the year 1902 and subsequent?

A. Yes, sir.

Q. Do you recall taking up the matter of collecting the Tax Bills sued on in this case with the Board of Public Works of this City?

A. Yes, sir.

40 Q. State, if you please, what conversation you had with the Board of Public Works, or other City official, relative to the payment of these certificates or charges by the City?

Mr. Garner: I object to that, as immaterial and irrelevant, because any conversation with the Board of Public Works or with the City Officials couldn't bind the defendant in any way to the pay-

ment of these tax bills, or, create any liability upon the part of the defendant.

The Court: The objection will be sustained.

Mr. Scarritt: This is in support of the allegation of the petition, as follows: "Plaintiff alleges that prior to the commencement of this action if offered to surrender to the Board of Public Works and to Kansas City, said certificates or taxbill issued as aforesaid if the city or said board should believe and hold that the said certificate or taxbill was not a certificate of said Board of Public Works conformable to the provisions of Section XIV, Article IX of the charter of Kansas City, and to accept in lieu thereof such a certificate as is provided for by said Section 14, but said city and said board refused to accept the same or issue a new certificate in lieu thereof and denied all liability for the said charge." Does Your Honor care to modify your ruling?

The Court: You can show that fact. But, that isn't what you asked.

Q. Did you have a meeting with the Board of Public Works, Mr. Palmer, in that matter?

A. Yes, sir.

Q. Was the Board then in regular session?

A. Yes, sir.

Q. You may state about what time that was,—whether it was subsequent, say to June, 1902?

A. It was after the final affirmance of the judgment of condemnation; and, my recollection is after the money too had been paid to the property owners.

Q. I will ask you, if at that time you offered to surrender to the board of public works and Kansas City the certificates of tax bills referred to in this suit, described in the petition in this suit, if the city or board should believe or hold that they were not such
41 certificates of said board as would be conformable to section XIV, Article IX of the charter?

A. Yes sir.

(By Court:)

Q. Did you make any offer to that board, in reference to these tax bills?

A. Yes, sir.

Q. What was it?

A. I stated to the board, that in my judgment no certificate was necessary; but, if the board preferred to have the certificates in regular form, I would surrender these bills and take a certificate or certificates against the tracts of ground described in the bills.

Mr. Garner: We object to that as incompetent, immaterial and irrelevant under this petition—as what he stated and what the board answered would not enlarge, or decrease or diminish the powers of the city under the charter, or the board of public works under the charter.

Mr. Scarritt: It seems to me, if we can get the facts out, we can argue the legal proposition afterwards.

The Court: I do not think that the city can be bound by anything that took place subsequent to the issue of the tax bills—especially, by anything that was said by the board of public works.

By Mr. Scarritt:

Q. You may state whether or not the board of public works, upon this statement of yours, neglected or failed to take any action?

Mr. Garner: Objected to as immaterial.

The Court: Proceed.

To which ruling and action of the court the defendant by its counsel then and there duly excepted.

A. They didn't issue any certificate, and, failed to pay the money.

Q. Did they at that time object to the payment of these charges?

Mr. Garner: Objected to, because they had no authority to pay them under the charter,—it couldn't change their powers or duties under the charter.

42 The Court: The only way to do, would be to issue the certificates.

The Court: He has already testified that they refused to pay the money.

(By Mr. Scarritt:)

Q. Did you demand the satisfaction of this claim from the Board of Public Works and the City Counselor, Mr. Palmer?

Mr. Garner: I object to that, for the reason that neither had the power to do anything except in an advisory state.

The Court: I don't think they had power to pay it. They refused to issue the certificate, that they did have power to do it. I presume that is far enough.

43 Mr. Scarritt: We now offer in evidence Ordinance of Kansas City, No. 13067, entitled: "An ordinance to open and establish a public parkway in the south park district in Kansas City, Missouri".—known as the "Paseo Extension",—approved October 3, 1899.

Said Ordinance No. 13067, as offered in evidence, is in the words and figures following, to-wit:

Ordinance No. —.

An Ordinance to Open and Establish a Public Parkway in the South Park District in Kansas City, Missouri.

Whereas, the Board of Park Commissioners of Kansas City, Missouri, has selected and designated certain lands hereinafter described, to be acquired and used for a public parkway, and has recommended to the Common Council of Kansas City, the acquisition and establishment of the same as and for a public parkway according to law; therefore,

Be it ordained by the common council of Kansas City.

Section 1. That a public parkway be, and the same is hereby opened and established in the South Park District in Kansas
44 City, Missouri, comprising and including the following described lands situated in said South Park District aforesaid: to-wit:

Here follows a description, by definite but irregular boundary lines, of a tract of land extending from near 17th Street on the north to 31st Street on the south in Kansas City, Missouri, a distance of about a mile and a half, and which varies in width from 100 to 600 feet, including at various points certain streets and alleys. The portion which includes the land affected by the tax bills now in question, varies in width from 100 feet to a maximum of 380 feet, with an average width of about 175 feet. And all the private property within the boundary lines above described is hereby taken and condemned for public use as part of said parkway.

Section 2. The private property to be taken as aforesaid, shall be paid for by special assessments upon real estate and just
45 compensation therefor shall be assessed, collected and paid as provided in Article Ten (X) of the Amended City Charter of Kansas City.

The special assessments to be made in payment for the private property taken or damaged in pursuance hereof, shall be paid in twenty (20) equal annual installments, such installments to be payable at such times and in such manner and with such interest as is provided in Section Twenty-one (21) Article Ten (X) of the Amended Charter of Kansas City, for the payment of installments of assessments made payable in more than one (1) installment.

Section 3. The Common Council determines and prescribes the limits within which private property shall be deemed benefitted by the improvements herein proposed and be assessed and charged to pay compensation therefor as follows, to-wit:

The whole of the South Park District, as the same is defined and described in Section Seven (7) Article Ten (X) of the Amended Charter of Kansas City as existing and now in force.

Section 4. The Common Council finds and declares that the action of the Common Council herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, as provided by law, and that said Board of Park Commissioners has selected and designated the land described in Section One (1) of this Ordinance, to be acquired and used for a public parkway, and has recommended to said Common Council the acquisition and establishment of the same as and for a public parkway, and has further recommended that if the Common Council should determine that said land to be acquired as aforesaid should be paid for by special assessments upon real estate, said assessments shall be made payable in Twenty (20) equal annual installments, as provided in Section Two (2) of this Ordinance.

46 Section 5. All ordinances or parts of ordinances in conflict herewith, are, insomuch as they conflict with this ordinance, hereby repealed.

Approved Oct. 3, 1899.

JAS. M. JONES, *Mayor.*

Mr. Scarritt: We now offer in evidence the records of the clerk of the circuit court of Jackson County, Missouri,—Condemnation Record N, Division No. 2, on page 155, under the date of Saturday, June the 8th, 1901, entry in the condemnation cause conducted under the Ordinance aforesaid, the cause being numbered No. 1013.

Said entry on condemnation Record "N", page 155, so offered in evidence, is in the words and figures following, to-wit:

Record N, p. 155. April Term, A. D. 1901. 53rd day. Saturday, June 8, A. D. 1901.

No. 1013.

In the Matter of the Condemnation of Land for Opening and Establishing a Public Parkway in the South Park District in Kansas City, Mo.

Now on this 8th day of June, A. D. 1901, in this the Circuit Court of Jackson County, Missouri at Kansas City, Division Number two (2) at the court room of the court in the county court house at Kansas City, Missouri being the day and place to which these proceedings were regularly continued by the court for the jury in these proceedings to return into court and to render and deliver to the court their verdict in these proceedings if they have fully
47 considered, determined and agreed upon the same, come parties, Kansas City, Missouri appearing by its counselor R. B. Middlebrook, Esq., and the attorney and counselor of the Board of Park Commissioners of Kansas City, Missouri, R. E. Ball, Esq.

And come into court pursuant to order of court, F. D. Crabbs, Charles D. Mill, H. I. Boice, J. H. Rout, C. E. Moss, and M. B. Wright, the jury in these proceedings.

The said jury having fully considered, determined and agreed upon their verdict in these proceedings now render and deliver the same to the court signed by each of them.

The court orders that the said jury and each of them as claimed by them, be allowed for thirty-six (36) days' services rendered in these proceedings.

Mr. Scarritt: Now, we offer in evidence the verdict filed in that cause,—being the volume entitled "Condemnation Cases",—"No. 1013. Verdict of jury in Parkway in South Park District, Paseo Extension."

"Filed June 8, 1901."

Mr. Scarritt: We now offer in evidence from the same record heretofore referred to,—being Record "N" of the Circuit Court
48 of Jackson County, Missouri, Division No. 2, page 201 and subsequent pages, dated September 14, 1901, being the order of the court overru-ing motions for New Trial in case No. 1013, and the judgment of confirmation of the verdict of the jury.

Mr. Scarritt: And also, from the same record, at page 215, we offer in evidence the order of the Court, made in the same cause,

overruling the Motion of Thomas H. and Julia Mastin, to set aside the verdict of the jury in this cause.

Mr. Scarritt: We now offer from the same record, page 507, under date of June 23rd, 1902, the entry made in said cause, showing the filing of the Mandate of the Supreme Court in that cause; and also the Mandate itself, appearing on the record, in the same record at page 508.

Said mandate shows that the judgment of the circuit Court in said cause was affirmed by the Supreme Court of Missouri on June 4, 1902, and that the said mandate was filed in the Circuit Court of Jackson County, Missouri, on June 23, 1902.

Mr. Scarritt: We now offer in evidence from the record in the office of the Clerk of the Circuit Court of Jackson County, Missouri,—being Condemnation Record No. 1, at page 239, the entry in said cause numbered 1013, in which it was ordered that the title to the lands condemned are divested out of the owners thereof and invested in Kansas City, for public purposes, and adjudging the possession thereof in Kansas City which entry is as follows:

"Now on this 5th day of September, 1903, come all the parties, Kansas City appearing by its counsellor and all the persons and parties interested in this proceeding having been fully and lawfully notified. * * *

And the report of Joseph S. Brooks, special commissioner, of this court, heretofore filed in these proceedings on July 25, 1903, which said report is in the words and figures following, to-wit: (Here is set out the report of Special Commissioner having been fully heard and considered together with the proofs and evidence, and

49 no exceptions having been taken or objections made to said report or to the proofs and evidence and the court being fully advised in all the premises finds and adjudges that Kansas City, Missouri, has lawfully made full payment of the compensation and damages for all the property condemned and taken by these proceedings and respectively of all lots and parcels thereof; that such payment has been respectively and lawfully made to the persons or parties in whose favor judgment therefor has been rendered by this court in these proceedings. * * *

It is therefore, considered, adjudged and decreed by the court that the title in fee to and every other interest in the following described lands so condemned and taken situated in the South Park District, in Kansas City, Jackson County, Missouri, to-wit: (Here follows description of the same lands described in the Paseo Extension Condemnation Ordinance:)

Wherefore, it is considered, adjudged and decreed by the court that the title in fee to and every other interest in the aforesaid lands so condemned be and is divested out of the owners thereof and all other persons interested and vested forever in Kansas City, Missouri, to the use of the South Park District of Kansas City, Missouri, as and for a public parkway according to law to be known as the Paseo Extension provided and specified in said ordinance of Kansas City, Missouri, numbered 13067, approved the 3d day of October, 1899, and entitled 'An Ordinance to open and establish

a public parkway in the South Park District in Kansas City, Missouri,' known as the Paseo Extension; that Kansas City, Missouri, be put in possession of all said lands so taken and condemned without delay, and that proper writ or writs issue therefor; that Kansas City, Missouri, pay the costs of these proceedings and that execution issue as to said costs."

Mr. Garner: Your Honor, I object to any of the evidence in this cause, based upon those proceedings instituted and the liability growing out of those proceedings instituted for the extension of the Paseo.

50 The Court: It will be overruled.

To which ruling and action of the court the defendant by its counsel then and there duly excepted.

Mr. Scarritt: You don't deny that you are the owner of this property, do you?

Mr. Garner: No, sir. But, that has to be paid by tax bills, and not by certificates that are issued.

The Court: I understand.

Mr. Scarritt: We rest.

Here the plaintiff rested its case:

Defense.

And thereupon the defendant, to sustain the issues upon its behalf, offered and introduced evidence oral and documentary in the words and figures following:

CHARLES E. DONNELLY, called as a witness on the part of the defendant, having been duly sworn testified as follows:

Direct examination.

By Mr. Garner:

Q. Mr. Donnelly, you are connected with the city engineer's office?

A. Yes, sir.

Q. You will please state what connection you have with the city engineer's office.

A. I am chief draughtsman in the office of the city engineer.

51 Q. I will get you to state to the court what book that is you have, Mr. Donnelly?

A. "Special Tax Bill Record. Sewers. No. 46."

Q. Does that include the tax bills for sewers in Sewer District No. 146?

A. The record of them, yes, sir.

Q. I will get you to state what, if any, receipt that record contains from Mr. Michael Walsh, the contractor?

A. Yes, sir. (Producing entry in book.)

Mr. Garner: I offer in evidence the receipt. This receipt is on page 77, Special Tax Bill Record. Sewers. No. 46. Said entry so

offered was read in evidence, and is in the words and figures following, to-wit:

Received this day the above mentioned special tax bills, amounting to the sum of $71,521.32 in full for work done on sewer constructed in above named district, and of all claims against Kansas City on account of above mentioned work.

MICHAEL WALSH,
Contractor.

(By Mr. Garner):

Q. What is the date of that receipt, Mr. Donnelly?
A. March 15th, 1902.

52 Cross-examination by Mr. Scarritt:

Q. Mr. Donnelly, you know that the property in the south Paseo extension was taken possession of by Kansas City about July, 1902, and has been improved and used as a parkway since that time?
A. Yes, sir.

Mr. Garner: That is all, Your Honor, I believe.

Here the defendant rested its case:
Here the plaintiff rested its case:

And the foregoing was all the evidence offered and introduced on the trial of this case.

The following declarations of law asked by the plaintiff were given by the court:

I.

The court declares the law to be that the finding upon each of the seventy-five counts contained in the amended petition in this case should be in favor of the plaintiff.

II.

The court declares the law to be that under the evidence the certificates or special tax bills in evidence cannot be lawfully collected from those persons who were the owners of the property described therein respectively prior to the condemnation and taking of
53 such properties for public use, and that the said certificates or special tax bills are not lawfully collectible from or chargeable against the amount allowed to such property owners respectively as compensation for the land so taken and condemned for public use.

III.

The court declares the law to be that if you believe from the evidence the lands described in the several certificates or taxbills introduced in evidence were at the time of the issuance of the said certificates or tax bills, to-wit: March 15, 1902, owned and were in the possession of certain individuals, and that the said certificates or

special tax bills became and were when issued valid liens against the tracts of land therein described respectively, and that thereafter Kansas City, the defendant, under and by virtue of the ordinances and court proceedings in evidence paid for the said lands and took possession thereof and appropriated the same to public use, then you are instructed that the said city did not and could not consistently with the provisions of the Fourteenth Amendment to the Constitution of the United States deprive the owner of such certificates or tax bills of its property rights therein, and if you further find from the evidence that Michael Walsh completed the work of constructing the district sewers in Sewer District No. 146 under and in
54 compliance with the terms of his contract thereof in evidence, and that thereupon the Board of Public Works of said city ascertained the cost of said work for which the several lands named in the certificates or tax bills in evidence and the owners thereof respectively, and the said city, were justly liable on account of the said improvements and that the said Board of Public Works certified the said amount upon its records and by the certificates or tax bills in evidence as the proportionate share of the cost of said work chargeable to or on account of said lots respectively, and delivered such certificates or tax bills to said Walsh, and said Walsh sold and assigned the same to the plaintiff for a valuable consideration prior to the institution of this suit, then defendant is liable to plaintiff for the amount of the said assessments respectively, with interest from March 15, 1902, and your verdict should be for the plaintiff accordingly.

IV.

The court declares the law to be that this is an action at law wherein and whereby the plaintiff claims and asserts that the defendant, Kansas City, a municipal corporation organized and existing under and by virtue of the laws of Missouri, and as an agency of said state, has by its official acts, ordinances and conduct appropriated to public use the property and property rights of the plaintiff, which property rights consisted of valid, subsisting liens
55 against certain real estate of the value of more than $5,000, without making just compensation, or any compensation therefor, and has thereby deprived the plaintiff of its said property without due process of law, and contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, and especially that part thereof inhibiting states from depriving a person of his property without due process of law, and contrary to the bill of rights of the state of Missouri to the effect that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation.

To which action of the court in giving said declaration of law and each of them the defendant at the time excepted and still excepts.

And afterwards, to-wit: on Saturday, the 23rd day of January, 1910, and at said January term, 1910, of said circuit court, the court, sitting as a jury under the pleadings, the evidence and the declarations of law given as aforesaid, gave judgment for plaintiff and against the defendant, and made and caused to be entered of record in said cause the following finding:

56 Record 306, Page 104, Saturday, January 22, 1910, 12th Day of January Term, 1910.

No. 28186.

MUNICIPAL SECURITIES CORPORATION
vs.
KANSAS CITY.

Now on this day come the said parties and by their respective attorneys and by agreement of parties a jury is now waived in the trial of this cause and the same is now taken up and submitted to the court and the court after hearing the evidence and being fully advised in the premises finds the issues in favor of the plaintiff and does assess its damages upon each count of the petition in the following sums:

57 On the first count, $63.50; on the second count, $52.92; on the third count, $52.92; on the 4th count, $52.92; on the 5th count, $52.92; on the 6th count, $29.75; on the 7th count, $19.84; on the 8th count, $26.48; on the 9th count, $39.51; on the 10th count, $52.92; on the 11th count, $52.92; on the 12th count, $52.92; on the 13th count, $52.92; on the 14th count, $63.50; on the 15th count, $55.44; on the 16th count, $55.44; on the 17th count, $55.44; on the 18th count, $55.44; on the 19th count, $55.44; on the 20th count, $55.44; on the 21st count, $55.44; on the 22nd count, $55.43; on the 23rd count, $120.20; on the 24th count, $120.30; on the 25th count, $24.09; on the 26th count, $96.31; on the 27th count, $96.41; on the 28th count, $24.09; on the 29th count, $72.35; on the 30th count, $48.24; on the 31st count, $48.26; on the 32nd count, $72.42; on the 33rd count, $24.16; on the 34th count, $96.63; on the 35th count, $120.89; on the 36th count, $16.80; on the 37th count, $16.80; on the 38th count, $16.80; on the 39th count, $16.80; on the 40th count, $16.80; on the 41st count, $18.13; on the 42nd count, $55.94; on the 43rd count, $55.94; on the 44th count, $69.82; on the 45th count, $55.94; on the 46th count, $41.96; on the 47th count, $61.53; on the 48th count, $55.94; on the 49th count, $55.94; on the 50th count, $55.94; on the 51st count, $55.94; on the 52nd count, $55.94; on the 53rd count, $55.94; on the 54th count, $55.94; on the 55th count, $27.97; on the 56th count, $29.97; on the 57th count, $12.52; on the 58th count, $13.42; on the 59th count, $55.94; on the 60th count, $41.96; on the 61st count, $16.15; on the 62nd count, $41.96; on the 63rd count, $55.94; on the 65th count, $55.94; on the 66th count, $55.94; on the 67th

count, $55.94; on the 68th count, $55.94; on the 69th count, $55.94; on the 70th count, $55.93; on the 71st count, $55.93; on the 72nd count, $55.93; on the 73rd count, $61.53; on the 74th count, $41.58; on the 75th count, $55.44, making the total amount of its damages $3,924.42 and judgment is ordered accordingly.

58 It is therefore, now considered, ordered and adjudged by the court that said plaintiff have and recover of and from said defendant the sum of three thousand, nine hundred twenty-four dollars and 42/100 ($3,924.42) together with all costs herein incurred and expended (with interest thereon from January 15th, 1910, at the rate of six per cent — annum) and have therefore execution.

And afterwards, and within four days, to-wit: On Tuesday the 25th day of January, 1910, and at said January Term 1910, of said Circuit Court defendant filed its motion for a new trial in said cause in the words and figures following, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1910.

No. 28186.

MUNICIPAL SECURITIES CORPORATIONS, Plaintiff,
v.
KANSAS CITY, Defendant.

Motion for New Trial.

Comes now defendant, Kansas City, and moves the court to set aside the finding and judgment herein and grant the defendant a new trial, and for ground of its motion states:

1. That the court erred in admitting improper and illegal testimony offered by plaintiff against the objection of defendant.

59 2. That the court erred in rejecting proper and legal testimony offered by the defendant.

3. That the court refused legal and proper declarations of law offered by the defendant.

4. That the finding is against the evidence.

5. That the finding is against the law.

6. That the finding *as* against both the law and the evidence and against the law under the evidence.

7. That the finding is against both the law and evidence and against the law under the pleadings.

8. That the court erred in rendering a general judgment against the defendant under the pleadings.

9. That the pleadings were against the weight of the evidence.

EDWIN J. SHANNAHAN,
Attorney for Kansas City.

And afterwards, to-wit: On Saturday the 29th day of January, 1910, and at said January Term, 1910, of said Circuit Court, the

court overruled defendant's said Motion for a New Trial; to which ruling and action of the court in overruling said Motion for a New Trial, the defendant by its counsel then and there duly excepted and still excepts.

And afterwards, to-wit: On Tuesday, the 22nd day of March, 1910, and at said January term, 1910, of said Circuit Court the defendant filed in said cause its Application for Appeal and Affidavit for Appeal in the words and figures following, to-wit:

60 In the Circuit Court of Jackson County, Missouri, Division 3, at Kansas City, January Term, 1910.

No. 28186.

MUNICIPAL SECURITIES CORPORATION, Plaintiff,
v.
KANSAS CITY, Defendant.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

Edwin J. Shannahan, of lawful age, first being duly sworn upon his oath states that he is the agent and attorney for the above named defendant, Kansas City; that he makes this affidavit for and in its behalf; that judgment was rendered by the court in the above entitled cause in favor of plaintiff and against the defendant Kansas City, and the defendant Kansas City Court of Appeals of the state of Missouri, from said judgment; that said appeal is not made for vexation or delay but because affiant believes that said Kansas City, appellant herein, is aggrieved by the judgment and decision of the court, and prays that said appeal be granted.

EDWIN J. SHANNAHAN.

Subscribed and sworn to before me this 22nd day of March, 1910. My term expires July 8, 1911.

ANNA L. DONAHUE,
Notary Public, Jackson County, Missouri.

61 And afterwards, and on the same day, to-wit: On Tuesday, the 22nd day of March, 1910, and at said January Term 1910, of said Circuit Court, the court sustained defendant's said application and affidavit for appeal and granted and allowed the defendant, Kansas City, an appeal in said cause to the Kansas City Court of Appeals.

Given under the hand and seal of the Honorable Thomas J. Seehorn, Judge of Division No. 3, of said Circuit Court, before whom the said proceedings were had, this 17th day of March, 1910.

T. J. SEEHORN,
Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 3.

We hereby approve the foregoing Bill of Exceptions.

SCARRITT, SCARRITT & JONES,
Attorneys for Plaintiff.

62 Thereafter, to-wit, on February 23rd, 1915, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of Missouri, Division No. 2, October Term, 1915.

"MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended and have execution therefor (Opinion filed)."

And thereafter, to-wit, on March 4th, 1915, the following further proceedings were had and entered of record in the above entitled cause:

(Caption Omitted.)

"Comes now the said respondent, by attorney, and files its motion for a rehearing herein."

Which said motion for rehearing is in words and figures as follows, to-wit:

63 In the Supreme Court of Missouri, Division No. 2, October Term, 1914.

No. 16831.

MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Motion for Rehearing.

Municipal Securities Corporation, Respondent in the above entitled cause, respectfully moves the court to grant it a rehearing of the said cause, and assigns the following reasons for a reconsideration thereof;

1. The special tax bill mentioned in the petition when issued was made up, certified and delivered by the Board of Public Works of Kansas City acting under their Charter powers, and therefore was an assessment certificate of the defendant Kansas City evidencing a lien fixed by that city in the exercise of its powers of taxation against the tract of land therein described. It was a Kansas City special tax bill. It was an express declaration by Kansas City that a lien to the amount named therein existed against the tract of land described therein in favor of the contractor for the sewer work in question, and of his assigns, as a part payment to the extent of the amount named therein of the contract price for constructing a certain sewer. It was a declaration upon the part of the defendant city that the tract of land described therein was private property and not a public street. Confessedly, and the spirit if not the language of the divisional opinion concedes this fact to be true, and the lot described in the tax bill was in the quiet and peaceful possession of a private property owner as his property—that possession and that ownership being guaranteed to him by the State Constitution—at the time the tax bill was issued. The tax bill is, itself, prima facie evidence of the validity of the tax proceeding and of the liability of the land named therein for the amount so levied. Kansas City Char-
64 ter, Art. 9 Sec. 18 provides: "Every tax bill shall in any suit thereon be prima facie evidence of the validity of the bill * * * and of the liability of the land to the charge stated in the bill."

The conclusion that the Board of Public Works did not abuse their discretion, if they had any, or violate their express powers under the charter of Kansas City in issuing and delivering this tax bill is made clear by Article 9, Section 10 of the Kansas City Charter, reading as follows:

"As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for that purpose, the Board of Public Works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors, a special tax bill for the amount of the special tax against each lot in the district," etc.

When the sewer contracted for was completed by the contractor the lot described in this tax bill was a lot or tract of land in the sewer district. It had a definite area. It was in the possession of a private owner as his property, it was not a street. It is stultifying to say that at that time this private land was a street; and therefore, the Board of Public Works, being guided by the charter mandate under which they were acting and by nothing else, issued this special tax bill against this particular lot. If the Board had omitted this particular lot from assessment and had superimposed the burden which the charter required them to impose upon this particular lot

upon the remaining lots within the taxing district, every tax bill which evidenced too great a burden against them respectively would have been void, under well recognized principles of taxation. The Board of Public Works, therefore, in issuing this special tax bill acted within the limit of their authority, and that tax bill being well issued constituted a right, a thing of value; it was property. It was legal evidence of an existing lien. It was a right which, under the uniform line of decisions in this state, was assignable; it
65 had value, and therefore, as property it was protected by the guaranties of the Constitution of the State, and the Fourteenth Amendment to the Constitution of the United States inhibiting states from depriving a person of his property without due process of law.

2. The protection of the Federal Constitution has been constantly and repeatedly invoked, pleaded and relied upon as a bulwark against the assaults of the defendant Kansas City in its efforts to take away from the plaintiff its property and property rights in and to the special tax bills described in the petition: For in the petition, after narrating in order the facts in which which this controversy is involved, it is expressly alleged and claimed that "Kansas City cannot by an act of itself not concented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy the plaintiff's right to collect the cost of the said work according to its said contract (that is through the tax bill), and in support of this claim the plaintiff invokes the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and as against the acts of states."

And again at the conclusion of the trial below, the plaintiff asked an instruction or declaration of law, which by that court was allowed, but which by this court in effect has been disallowed; which instruction is as follows:

"The court declares the law to be that this is an action at law wherein and whereby the plaintiff claims and asserts that the defendant, Kansas City, a municipal corporation organized and existing under and by virtue of the laws of Missouri, and as an agency of said state, has by its official acts, ordinances and conduct appropriated to public use the property and property rights of the plaintiff, which property rights consisted of valid, subsisting liens against certain real estate of the value of more than $5,000, without making just compensation, or any compen-ation therefor, and has thereby deprived the plaintiff of its said property without due process of law, and contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States and especially that part thereof inhibiting states from depriving a person of his property without due process of law, and contrary to the bill of rights of the State of Missouri to the effect that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation." (Record pp. 62, 63).

66 The divisional opinion is opened with the declaration, "We get jurisdiction because the Fourteenth Amendment to

the federal constitution is pleaded and invoked." And with that great, fundamental and all pervading principle constitutionally announced as the basis of our national jurisprudence to the effect that by no power or agency shall a person be deprived of his property without due process of law, and with a similar declaration as the rights of individuals in the state constitution, this court, in the concluding part of their opinion, feel constrained to say that "defendant may not be held under the law in this sort of action for this sort of claim, much as we may deprecate the palpable dishonesty such a condition of the law permits to be perpetrated." And the result is that within eighteen months after this tax bill was issued, the city takes over the possession of these lots and by that act prevents the plaintiff from enforcing that tax bill and thereby destroys plaintiff's property therein and goes acquit!

3. This honorable court have, we submit, fallen into error in conceiving that the plaintiff must be denied a recovery even if the city's conduct was wrongful or tortious on the ground that the wrong was sustained by Walsh, the contractor, plaintiff's assignor, and not by the plaintiff, because Walsh has not assigned to the plaintiff any cause of action sounding in tort, but only the tax bills.

The Divisional opinion recites, "If Walsh himself had sued for the tort of conversion alleged in effect by the briefs and contentions of counsel for plaintiff a different and much more serious question would confront us; but it seems idle to insist that upon the petition here and upon the assignment above quoted, the plaintiff may recover upon the theory of tort. * * * No such tort is assigned. Nothing is assigned but the tax bill and the lien thereof."

What wrong did Walsh, the contractor, sustain, that he should have the cause of action rather than the plaintiff? It is true
67 he built the sewer, performed all the terms of the contract between himself and the city binding upon him. But he took the special tax bills issued by the city to the full extent of the contract price stated in dollars, which the city had agreed to deliver to him, and he sold these tax bills to the plaintiff and got full value for them. He solemnly assigned, transferred and delivered these tax bills to the plaintiff. Plaintiff paid out its money for them. All of this was done while the lots or tracts of land described in the respective tax bills were in the quiet and peaceable possession of individuals as owners of private property, and while that ownership was protected by the Constitution of the State of Missouri, Article 2, Section 1, to the effect:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or in court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein molested," etc.

And the Kansas City Charter, Article 10, Section 28, is to this effect:

"The city shall not be entitled to the possession of any lot or

parcel of property taken under the provisions of this article until full payment of the compensation therefor, as determined, be made or paid into court for the use of the persons in whose favor such judgment may have been rendered, or who may be lawfully entitled to the same; and upon such payment as aforesaid, such circuit court, or judge thereof, in which proceedings were had, shall immediately order, adjudge and decree that the title in fee to, and every other interest in the land so condemned and taken for such park, road, boulevard, avenue or public use, be divested out of such owner and other persons interested, and vested forever in the city to the use of said park district or districts; and the court shall thereupon without delay put the city in the possession thereof."

These tax bills were made out, issued and delivered to the contractor Walsh on March 15, 1902, and were forthwith sold, assigned and delivered to the plaintiff. Walsh's contract with the city to construct this sewer was confirmed by ordinance of Kansas City on April 22, 1901, and on that date, according to its terms and the charter and ordinances of Kansas City, became binding and obligatory upon both parties thereto. By this contract it was stipulated that Walsh should receive a stated contract price, the same being stated in dollars and cents, in special assessments aggregating
68 the same amount, against lands lying within the district subject to taxation, apportioned according to the relative areas of such lands; and the divisional opinion in referring to the assessments levied to pay for the parkway in the condemnation proceeding recites:

"The law is fairly well settled that the title of the city to these lots (i. e., the condemned lots) for use as a street attached by relation back under the facts here to the date of the judgment confirming the verdict of the jury, to-wit, September 14, 1901, a date long prior to the issuing of the tax bills, which were issued March 15, 1902".

Walsh's contract, therefore, bore date long prior to the date of the judgment affirming the verdict, and the stipulations of his contract being inviolable entitled him to the tax bills evidencing liens equivalent in amount to the contract price of the sewer work; but upon the undisputed record now before the court the lots of land described in the special tax bills remained in the possession of and as the private property of their respective owners until September 5th, 1903, when the circuit court acting in the condemnation case found that the city had acquired these several lots, and thereupon it was "considered, adjudged and decreed by the court that the title in fee to and every other interest in the aforesaid lands so demanded be and is divested out of the owners thereof and all other persons interested, and vested forever in Kansas City, Missouri" (p. 11, Additional Abstract of Record for Respondent.)

Even that decree of the court doubtless did not destroy the lien of these tax bills; but when the city, conformable to that decree, dispossessed the actual occupants of the land so condemned and itself went into possession and changed the lands from their status as private property of private owners to the status of public lands, whether

for the time being we call them parks, parkways, streets alleys or other property, and improved them as such, it deprived the plain-
69 tiff of the power under the laws of this state to enforce these liens by sales, because it is the established policy of this state that the property or lands of municipalities such as Kansas City may not be sold under execution. It was then, and not until then, that the wrong was committed which furnishes the very foundation to support this action and the wrong was not done to Walsh, the contractor, for he had gotten his money, but it was done to the plaintiff, the owner of the special tax bills described in the petition, for thereby the plaintiff's property rights in, under and by virtue of those special tax bills became as nothing. By that act of the city the lien of those tax bills became unenforcible. Before and while these lots were in the possession and were the property of private owners, this lien was a thing of value; it was a marketable security; it was worth par; but when the city changed the character of these lots from the property of private owners to the property of the public, and as a municipality put itself in the actual possession of them and spent public money in metamorphosing them into what we call in Kansas City a parkway, with beautiful lakes, and tennis courts, and great trees for the delight of the public, that lien became unenforcible, and the plaintiff was by that act of the city deprived of its property in and to those tax bills and the liens they evidenced.

4. The divisional opinion recites, "if the lots upon which the lines are averred to exist had been purchased or taken and condemned by the city for a park, or for a city hall, or for some such use as produced in the city a title in fee, then it would have been the duty of the Board of Public Works to issue certificates for the city's proportionate part of the cost of the improvements."

The opinion then proceeds to construe the word "parkway" as synonomous with "street," as the latter word is used in Section 14, Article 9 of the Kansas City charter to this effect.

"When the city shall own in fee simple absolute any lot or parcel of land, or hold any land not used as a street, avenue, alley or public highway, it shall out of the general fund pay its proper share of the cost of any such work to be paid for in special tax
70 bills as though a private owner of such lands but there shall be no tax bill against any land so owned and held by the city. The Board of Public Works shall ascertain the share for which the city shall be justly liable, and the amount so ascertained shall be certified to by the Board of Public Works."

And the court concludes that inasmuch as the title adjudged to the city in September 1903 as a matter of law at least for some purposes related back to the time of the condemnation verdict these lots were, when the tax bill was issued, viz., March 15, 1902, used as a street and were not at that date subject to assessment to pay for the sewer.

This court, we submit, is in error in reaching that conclusion. The language of the charter is to the effect that if the city shall own when the work is completed and the time for issuing tax bills to pay therefor arrives "any land not used as a street" the city shall pay its pro

rata share of the cost of the sewer work on account of such land the same as a private owner would be required to pay. Now it is incontestible upon this record that the lots in question at the time the tax bills were issued were not used as a street. They were the private property of private owners and nothing else. There is not a scintilla of evidence in this record that there is, or ever was, a road or highway across either of the lots described in these tax bills.

A parkway, as that word is used in the Kansas City charter, is in every instance distinguished from a boulevard. Take for instance, Section 5, Article 10 of the charter, which deals with parks and boulevards. The Park Commissioners are there required "to devise and adopt a system of public parks, parkways and boulevards for the use of the city and its inhabitants," etc. The same phrase, "parks, parkways and boulevards," is reiterated in many sections of that article, notably Sections 6, 8 and 9, and Section 29 where it is provided, "The lands which may be selected and obtained under the provisions of this article shall remain forever for parks, parkways and boulevards for the use of all the inhabitants of said city, subject to such rules
71 and regulations as may be prescribed by ordinance of the common council upon recommendation of the Board of Park Commissioners." So that the words "parkway" and "boulevard" are not used as synonymous in the Kansas City charter.

It may occur, of course, that a parkway could be laid out and constructed so as to constitute substantially nothing more than a highway, but it is equally true that a parkway may have the proportions and uses of a park as well as those of a highway. The ordinance establishing the parkway here in question is in evidence, and it shows upon its face that at places the condemned territory is more than five hundred feet in width. It shows upon its face to extend from Eighteenth street to Thirty-first Street. The names of many streets forming its boundaries are recited in describing it so that at places it is two or three blocks wide. Any one at all familiar with Kansas City, or the names of its streets, and who may have gone along this beautiful parkway, knows that Troost Lake—one of the beautiful lakes of the city—is located within its bounds, and that there are great stretches of primeval forests in which are tennis courts, recreation houses, the natural topography of hill and vale and woodland that constitutes a beautiful park. These are facts inferentially shown by the record. These are proofs, and it is the character, and the territory and the uses to which they are devoted that must determine whether or not the lots or tracts of land comprising that territory when owned by Kansas City are to pay their just and pro rata share with other lands of the cost of constructing sewers, or whether they shall be exempt from these burdens because of their devotion to the exclusive use of streets, alleys or highways. If these are lands which should bear their pro rata share of the cost of the sewer construction when owned by the city, and if it be true as intimated in the divisional opinion that by construction the ownership of the city related back to the time the condemnation proceeding was begun and therefore adhered in the

city at the time the sewer work was completed, then we sub-
72 mit the records of the Board of Public Works in evidence apportioning the cost of the sewer amongst the several tracts of land followed up by the issue of tax bills, is such a certification as is contemplated by the charter in order to fix the liability upon the city to pay the amount of this assessment out of its general fund as contemplated by the Kansas City Charter.

If, on the other hand, it be true that at the time the sewer work was completed and the tax bills issued these lots were the private property of individual owners, then the tax bills in question were well issued, and they by sale and assignment became the property of the plaintiff; and if their character as special tax bills evidencing a special assessment, and their enforcibility was destroyed by the act of the city in taking actual possession of the lots so assessed, and by transforming those lots into the property of the public, whether as a park, parkway or street, then that act of the city rendered impossible the enforcement of the tax liens against those lots, and the city has taken the property of the plaintiff, viz., the tax liens, without paying for it, and therefore without due process of law.

5. The divisional opinion quotes the constitution of the state, a section of the state statute and a section of the charter with the view doubtless of affecting the integrity of the contract between Walsh and the city for the construction of the sewer, or the obligation of the city to perform the stipulations of that contract binding upon it in respect to paying the contract price.

But the section of the state constitution cited, Section 48, Article 4, with all due respect to the court, we assert is not relevant, because the limitation there stated is upon the General Assembly, and is not a limitation upon the power of Kansas City, for Kansas City is a constitutional city, that is, its charter is derived from and founded upon an express constitutional provision authorizing its adoption. Constitution of Missouri, Article 9, Sections 16 and 17. Its charter so far as its local affairs are concerned, such as are now under consideration, is the supreme law, of course subject to consti-
73 tutional restrictions of its powers, and the state legislature has no power to interfere with such affairs. Can it be doubted that Kansas City under its charter was empowered to obligate itself to issue tax bills against all the lots in the taxing district at the time the sewer was completed?

And we submit, likewise, that the section of the statute referred to, being R. S. Missouri 1909, Section 2778, is not in point here, for two reasons. (*a*) The Legislature has no authority to interfere with the management by Kansas City of its local affairs; and (*b*) the contract here under consideration does not fall within the inhibitions of that section of the statute. The statute in effect says no city shall make any contract unless the same shall be within the scope of its powers, or unless such contract be made upon a consideration wholly to be performed in the future, nor unless it shall be in writing subscribed by the parties thereto, or their agents. Now this contract for the construction of the sewer was clearly within the

scope of the powers of Kansas City. The work was wholly to be performed in the future. It was in writing, and duly executed.

The provision of the charter of Kansas City cited, being Section 30, Article 4, Kansas City Charter, 1898, must be construed in the light of Section 14 of Article 9 of the same Charter, which latter section is an express and direct mandate in the nature of an exception to the general language of Section 30, Article 4, and is to the effect that when the city owns lots in fee simple not used for a street or highway it, the city, shall pay the same proportion of the cost of constructing a sewer in the district where such lands are located as would have been charged against the same lands had they been owned by individuals as private property. Of course the section of the charter cited has no application to the facts of this case if the assessed lots were private lands at the time the tax bills were issued.

74 6. Upon the plainest principles of established law and of recognized morality Kansas City ought not to be heard to deny that the lands described in the tax bills were the private property of individual owners at the time the tax bills in question were issued. These lands at that time were in the quiet and peaceable possession of individual owners as private properties and none of these lands at that time were in the possession of Kansas City, nor were they used as a street or parkway or park, nor for any other public use. Each of these tax bills expressly recites that a certain lot has been charged with a certain sum as provided by law for its proportion of the cost of constructing a certain sewer and is a lien against said land; and the city charter provides the manner in which such liens shall be enforced, and of course the provisions of the city charter in that respect are by construction to be taken and held as a part of the tax bill.

Plaintiff purchased these tax bills with all the property rights represented by them, and thereby acquired the lien which each tax bill represented, and it did so relying upon the express representations upon the face of each bill. And so it occurs that Kansas City discharged its obligation to the contractor Walsh by delivering these identical tax bills to him and obtaining an express receipt and discharge from Walsh for that consideration, and thereupon plaintiff purchased and had assigned to it these tax bills. At the time plaintiff acquired these tax bills they were fair upon their face. They purported to have been executed by due authority. The lands affected by them were at that time private properties and not public properties. They were in the quiet and peaceable possession of their respective private owners. Upon such a state of facts how can Kansas City now be heard by any court of justice to say that at the time the tax bills were issued the lands thereby assessed were not private lands but were public lands, and at the same time

75 claim that it is acquit of its contractual obligation to deliver special tax bills issued according to law? Neither courts nor conscience permit litigants to face about and falsify their solemn and previous declarations while they hold and refuse to return the fruitage obtained by and through those declarations.

Now if the assessed lands by reason of this state of facts are to be considered and held as against Kansas City as private lands at the time the tax bills were issued then the tax bills were well issued, and they were property, and were such property as is protected by the federal constitution, and that property was destroyed, when Kansas City took physical possession of these lands and changed them into public lands; For when they became public lands the right theretofore adhering in the owner of these bills to enforce them by judgment and execution was extinguished, because it is well settled in this state and elsewhere that the public properties of municipalities must not be sold upon execution.

In City of Clinton ex rel. Thornton v. Henry County, 115 Mo. 557, 568, opinion by Black, P. J., it is said by that thoughtful judge, after a mature consideration of the subject in hand and a review of authorities relating thereto from other states:

"Property owned by a county or other municipal corporation and used for public purposes can not be sold on execution. It is against public policy to permit such property to be sold; for the effect of a sale would be the destruction of the means provided by law for carrying on the government. 2 Dillon on Municipal Corporations, 4 Ed., Secs. 576, 577; Freeman on Executions, 2 Ed. Sec. 126. And section 2344, Revised Statutes of 1879 is declaratory of the same principle."

7. As against the claim that the impediment in the enforcement of the tax bill lien was the affirmative act of Kansas City occurring a year and a half after the tax bills were issued in taking possession of the lands covered by the tax liens and changing those lands from the private property of private owners to public lands owned by the municipality it will not do for Kansas City to plead in advoidance that the contract by virtue of which the tax bills were issued
76 and also the charter of the city required that the owner of the tax bills should assume all the hazards incident to the enforcement of the tax bills and of their validity. The terms of that contract and of the charter contemplated that Kansas City would in good faith and to the full extent of its corporate powers exercise every authority at its command to issue and preserve inviolate good and lawful special tax bills evidencing valid liens against the taxable lands.

With this obligation upon it, no court can contemplate otherwise than with aversion the claim of Kansas City that it by its own affirmative act can render these tax bills invalid and so deprive the plaintiff of its property and be excused from making good the loss so occasioned to the plaintiff on the ground that the owner when he took the tax bills assumed the risk of their validity. Such a rule of conduct falls far short of meeting up to the standard of legality uniformly recognized in courts of justice. One can not give something to pay a debt and then voluntarily take that something away or destroy it and thereafter be heard still to say that the debt was paid.

For the foregoing reasons respondent, Municipal Securities Corporation, prays the court to grant it a rehearing in this cause, and

that upon further consideration thereof the opinion and conclusion of the court be modified so as to affirm the judgment of the court below.

W. R. JAMES AND
SCARRITT, SCARRITT,
JONES & MILLER,
Attorneys for Respondent.

77 In the Supreme Court of Missouri, Division No. 2, October Term, 1915.

On March 2nd, 1915, the following further proceedings were had and entered of record in said cause:

16831.

"MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Comes now the said respondent, by attorney, and files its motion to transfer said cause to the Court in Banc."

And thereafter, to-wit, on March 30th, 1915, the following further proceedings were had and entered of record in said cause:

16831.

"MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Now at this day the court having considered and fully understood the motion heretofore filed by the said respondent to transfer this cause to the court in Banc, doth order that said motion be sustained, and that said cause be and the same is hereby transferred to the Court in Banc."

78 In the Supreme Court of Missouri, April Term, 1915. In Banc.

And thereafter, to-wit, on June 1st, 1915, the following further proceedings were had and entered of record in said cause:

16831.

"MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered be reversed, annulled and for naught held and esteemed and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor.

(Opinion filed).

Which said opinion is in words and figures as follows, to-wit:

79 In the Supreme Court of Missouri, Division No. 2, April Term, 1915.

[January Call, 1915.]

No. 16831.

MUNICIPAL SECURITIES CORPORATION, Respondent,
vs.
KANSAS CITY, Appellant.

This is an action at law in seventy-five counts for divers sums of money aggregating in all the amount of $3,924.42. Plaintiff sues as the assignee of one Michael Walsh, who made a contract with defendant city to construct certain sewers therein.

Each of the seventy-five counts in the amended petition was identical. This petition, in the view which we take of the case, is important, and in connection with the tax bills and the assignments thereof, is decisive of the case. In fairness, and for clearness sake we set out below one of these counts in full, omitting merely formal parts, as follows:

"Now comes plaintiff and for cause of action against defendant alleges that plaintiff is a corporation duly organized and existing under the laws of the State of Missouri, and the defendant is a municipal corporation duly organized and existing under the Constitution and laws of the State of Missouri.

"That by an ordinance of Kansas City, No. 16219, entitled, 'An ordinance to establish and cause to be constructed a district sewer in sewer district No. 146,' approved January 24th, 1901, said defendant, Kansas City, provided that a district sewer should be constructed

in sewer district No. 146 in said Kansas City as designated by said ordinance.

"Plaintiff alleges that bids for doing the work provided for
80 by said ordinance were duly advertised for by said Kansas City and a contract was duly entered into with Michael Walsh to construct the said sewer, he being the lowest and best bidder therefor.

"Plaintiff alleges that pursuant to said contract and ordinance said Michael Walsh constructed the sewer provided for by said ordinance and that by the terms of said contract and ordi-ance said sewer was to be paid for by special taxbills against the real estate within the said sewer district 146, as provided by the charter of Kansas City.

"Plaintiff alleges that Lot 1, Block 1, C. H. Pratt's Vine Street Addition, is located within said sewer district No. 146 and that at the time said work was done and tax bills therefor were issued, the owner of said property held the same subject to certain proceedings to condemn said lot for a public park-way in the South Park District in Kansas City, Missouri, known as the 'Paseo Extension,' under ordinance No. 13067, entitled, 'An ordinance to open and establish a public park-way in the South Park District in Kansas City, Missouri,' approved October 3, 1899. That by said ordinance last mentioned it was ordained that said Lot 1, Block 1, and other property should be condemned for the purpose of a public park-way. That under said ordinance proceedings were begun in the Circuit Court of Jackson County, Missouri, for the condemnation of land described in said ordinance as required by law. The owners of said lands at the date said condemnation ordinance was enacted were properly made parties to the proceedings and a hearing was had to determine the value of the property taken and a verdict in said case was rendered in the Circuit Court of Jackson County, Missouri, on the 4th day of June, 1901.

"Plaintiff alleges that motions for a new trial were filed in said cause, which were duly overruled and said verdict was duly confirmed and judgment was rendered in said cause on the 14th
81 day of September, 1901, by said circuit court.

"The plaintiff further alleges that said cause was appealed to the Supreme Court of the State of Missouri October 4th, 1901, and that upon said appeal said judgment of the Circuit Court was suspended until affirmed by the Supreme Court, and was so affirmed June 4th, 1902; and that subsequently to that date said Kansas City paid for and took possession under said condemnation proceedings of Lot 1, Block 1, C. H. Pratt's Vine Street Addition as a public park and now holds the same as such.

"Plaintiff alleges that while said condemnation case was pending upon appeal in the Supreme Court, said Michael Walsh completed the work under his contract for the construction of district sewers in sewer district No. 146 under said Ordinance No. 16219; and that the Board of Public Works of said city thereupon ascertained the share of the cost of said work for which the said lot and the owner thereof and the said city were justly liable, and the said board certi-

fied the said amount both upon its records and by a certificate or tax bill which it then issued to said Walsh on March 15th, 1902, in payment of the proportionate share of the cost of the work of constructing said sewer chargeable to or on account of said lot as provided by law. That the said certificate or tax bill was No. 84 and was issued against Lot 1, Block 1, C. H. Pratt's Vine Street Addition for the sum of forty-three dollars and twenty cents ($43.20), being the proportionate part of the cost of the said sewer required to be paid on account of said lot under the charter of Kansas City.

"Plaintiff alleges that for valuable consideration, said Michael Walsh heretofore sold and assigned said certificate or special tax bill to this plaintiff, who is now the owner and holder of the same, which is hereto attached, herewith filed and made a part of this petition.

"Plaintiff alleges that it is advised by counsel and believes, and therefore charges the fact to be, that by reason of the prior judicial determination of the value of said property and the judgment
82 of condemnation thereon, in said condemnation proceedings said tax-bill never became a lien upon the value of said lot awarded to the owner thereof, in said condemnation proceedings, but that upon the final determination of said condemnation case, the defendant, Kansas City, became and is liable to pay said amount of the said certificate or tax-bill with interest thereon, and that Kansas City can not by an act of itself not consented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy the plaintiff's right to collect the cost of the said work according to its said contract, and in support of this claim the plaintiff invokes the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and as against the acts of states.

"Plaintiff alleges that prior to the commencement of this action it offered to surrender to the Board of Public Works and to Kansas City said certificate or tax-bill issued as aforesaid if the said city or said board should believe and hold that the said certificate or tax-bill was not a certificate of said Board of Public Works conformable to the provision of Section XIV, Article IX of the charter of Kansas City, and to accept in lieu thereof such a certificate as is provided for by said Section 14, but said city and said board refused to accept the same or issue a new certificate in lieu thereof and denied all liability for the said charge.

"Plaintiff states that defendant has failed to pay the amount of said certificate or tax-bill, although payment thereof was demanded March 15, 1902.

"Plaintiff alleges that by reason of failure to pay said certificate or bill, or any part thereof, and by reason of its action in the premises, plaintiff is entitled to recover of defendant the amount so certified by said board as lawfully chargeable against said lot with interest as therein provided at the rate of ten per cent per annum.

"Wherefore, plaintiff asks judgment against defendant for
83 the sum of forty-three dollars and twenty cents ($43.20) with interest from March 15, 1902, at the rate of ten per cent per annum and for costs of this action."

The tax-bill referred to and made a part of the foregoing petition seems to have been the usual and ordinary special tax bill issued in payment for improvements, the costs of which are apportioned against the adjacent or abutting private real property. Said tax-bill was payable in four annual instalments, (including the first or initial cash payment), and as to the attachment and nature of the lien created thereby, a pertinent part of the said tax-bill thus provided:

"Kansas City Special Tax-Bill.

Issued on the Instalment Plan.

This certifies that the following described real estate in the corporate limits of Kansas City, County of Jackson, Missouri, as follows, to-wit: Lot 1, Block 1, C. H. Pratt's Vine Street Addition, has been charged with the sum of Forty-three ($43) Dollars and Twenty (.20) cents, as a Special Tax for constructing a sewer in Sewer District No. 146, as provided by Ordinance No. 16219, of Kansas City, Missouri, entitled, 'An Ordinance to establish and cause to be constructed a District Sewer in Sewer District No. 146,' approved January 24th, 1901. Said work has been completed according to contract by Michael Walsh, contractor, to whom this Special Tax-Bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and no longer, unless within such year suit shall have been instituted to collect this tax-bill, and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of this tax-bill shall continue
84 until the termination of such suit, and until the sale of the property under execution on the judgment establishing the same and no default in the payment of any previous installment hereinafter mentioned, shall operate to diminish the period during which such lien shall continue."

Upon the trial below judgment was rendered for plaintiff upon each of the said seventy-five counts, aggregating the sum mentioned, and defendant, according to the usual procedure, has appealed.

Other details necessary to an understanding of the case will be found set out in the opinion, where additional facts are stated in connection with the points discussed.

Opinion.

I.

We get jurisdiction because the Fourteenth Amendment to the Federal Constitution is pleaded and invoked and is said to be involved. At the outset two contentions of respondent meet us: (*a*)

that the record proper shows neither an affidavit for appeal nor the filing of a motion for a new trial, and (*b*) that no legally tangible matter is presented for our review by the motion for a new trial.

Counsel for respondent have evidently not read the appellant's abstract with care, and also they have overlooked the provisions of Rule 32 of this court adopted December 10, 1912. The record entries showing the filing of, and the orders of court touching the motion for a new trial, and the affidavit for appeal, as the abstract sets them out, are as follows:

"Thereafter on January 25, 1910, during the said January term, 1910, of said court and within four days after said finding and judgment, defendant filed its motion for a new trial. Said motion is hereinafter set out in the bill of exceptions and is hereby adopted and made a part of this abstract of the record as though printed in full at this place.

"January 29, 1910, during said January term, 1910, of
85 said court, said motion for a new trial was submitted to the court and upon due consideration, by an order duly entered and made of record, was, upon January 29, 1910, during said January term 1910, of said court, by the court overruled; to which action of the court in overruling defendant's said motion for new trial the defendant at the time excepted and still excepts.

"March 22, 1910, and during the said January term, 1910, of said court, defendant filed its application and affidavit for an appeal to the Kansas City Court of Appeals, which appeal was upon March 22, 1910, by an order duly entered and made of record, allowed as prayed to the Kansas City Court of Appeals."

The bill of exceptions, as the record shows it, contains the motion for a new trial in full, as also exceptions to the action of the trial court in overruling it. The affidavit for appeal is copied in full in the bill of exceptions and the contents of such affidavit fully comply with the law. This contention is therefore disallowed.

II.

Upon the point (*b*) made by respondent that the motion for a new trial presents no matter for our review when viewed in the light of the record, we note that complaint is made of error in refusing declarations of law, when none was asked; of the refusal to admit evidence of defendant, when none was refused, and of the admission of incompetent evidence for plaintiff when no such objection is kept alive here in the briefs for our examination. But defendant has in five separate assignments of error rung the changes upon the complaint, in hæc verba, that the finding is against both the law and evidence and against the law under the pleadings;" and while this is a jury waived law case, we think we are warranted in looking to
see whether there is any law or evidence which can sustain
86 this judgment. We may not weigh the evidence; for the trial judge alone had that privilege and duty. We may only look and see if there be any substantial evidence whatever in the case, which, when applied to the case made by the pleadings will,

as a matter of law, permit this judgment to stand. We disallow this point to respondent, conceding however that it is well taken as to all but the point last above noted.

III.

Coming now to the contentions of appellant (whom for clarity we shall call defendant), we note that the only point made and saved properly for review, is that we mention above, which we repeat, is saved, or so sought to be, by five separate assignments in defendant's motion for a new trial. It would be dolefule satire indeed if no point could be said to be preserved after so great labor and effort to save it.

The facts are neither contradicted nor disputed. The dispute is alone upon the legal effect of the facts. The defendant offered no evidence whatever, except a receipt to the defendant city, given on March 15, 1902, by the contractor Walsh when the tax-bills here sued on were issued to him. This receipt, omitting formal parts, sewer number and signature, is as follows:

"Received this day the above mentioned special tax-bills, amounting to the sum of $71,521.32 in full for work done on sewer constructed in above named district, and of all claims against Kansas city on account of above mentioned work."

The contract made by said Walsh with defendant, among other provisions, contained the following:

"Section 12. General Stipulations. It is further agreed that the passage of the ordinance herein-above referred to and the doing of the work embraced in this contract without any proper petition of the Common Council from the real estate owners to have said work done, shall not render the city liable to pay, directly or in-
87 directly, for such work or any part thereof otherwise than by the issue of special tax-bills and the said first party shall assume all risks as to the validity of such special tax-bills and take the same without recourse against Kansas City in any event."

"Sec. 15. And the said party of the first part further agrees that he will not be entitled to payment for any portion of the aforesaid work or materials, until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction of the city engineer, and that he will then receive pay according to the above schedule of prices in certified bills of assessments of special taxes against and upon the lands in said sewer district, as provided by law, and that his receipt therefor shall be in full of all claims against the city on account of said work."

Sec. 16. * * * That special tax bills be issued for the work of improvements herein provided for and shall be made payable in four equal installments payable and collectible and in all respects in compliance with the provisions of Section 23, Article IX of the charter of Kansas City."

The provisions of the charter of Kansas City in effect when the contract was made with Walsh and likewise when the tax bills were issued to him, provided relevant to the questions here troubling us, thus:

"As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors
88 to be paid, a special tax bill for the amount of the special tax against each lot in the district. The city shall in no event nor in any manner whatever be liable for or on account of the cost of work done in constructing, changing, diminishing, enlarging or extending any district sewer, except as hereinafter provided." (Sec. 10, Art. 9, p. 147, Charter of Kansas City of 1895.)

The exceptions creating liability against the city, noted in the last four words of the concluding clause of the above excerpt, are to be found in Sections 11 and 14 of Article 9, pp. 145 and 150, charter of Kansas City of 1898. The said exception in the section first above, in substance provides that in cases of the construction of joint district sewers the city may, if it be so provided both in the ordinance and in the contract, pay a specific part of the cost of such sewers. Neither the ordinance nor the contract so provided in this case. The other exception may be best shown by setting out, as we do below, the whole of said Section 14, in which said exception occurs, thus:

"Sec. 14. When the city shall own in fee simple absolute any lot or parcel of land, or hold any land not used as a street, avenue, alley or public highway, it shall out of the general fund pay its proper share of the cost of any such work to be paid for in special tax bills as though a private owner of such land, but there shall be no tax bill against any land so owned or held by the city. The board of public works shall ascertain the share for which the city shall be justly liable, and the amount so ascertained shall be certified to by the board of public works."

The Constitution of Missouri forbids the use of municipal funds in payment of any obligation arising contractually under circumstances such as are before us. [Section 48, Art. 4, Cons. 1875; State ex rel. v. Dierkes, 214 Mo. 578.] The statute of the State likewise forbids the expenditure of such funds upon obligations arising from contract, as will be seen by an examination of section 2778
89 R. S. 1909, which reads thus:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The charter of Kansas City had in it at all the times within th

period of the record herein, another provision which is pertinent and which prohibits the making of a contract to expend city funds till an appropriation therefor has been antecedently made and making void ab initio any contract made in contravention thereof. [Sec. 30, Art. 4, Charter Kansas City 1898.]

It follows from a consideration of all of the above prohibitions that no liability for the tax-bills, or for the payment of the money therein mentioned and which is based in anywise upon contract, could possibly arise against the defendant upon any view. The suit here is upon a tax-bill in some aspects and upon a tort as for conversion in others. The petition is sui generis, being possibly what is meant by learned counsel for plaintiff when they say of it in their brief that it is "typical in form."

We need not consider whether a recovery could have been had upon tort, as for the alleged conversion, or destruction, of the property upon which ordinarily the lien of the tax-bills would have been fixed. The assignment is not of the tort, nor of the contract, nor of the right to recover upon a quantum meruit, but of the tax-
90 bill pure and simple, for it says: "For value received — assign this special tax-bill and the lien thereof to Municipal Securities Corporation, etc." The lien assigned was upon the lots and not against defendant; but the law is fairly well settled that the title of the city to these lots for use as a street attached by relation back under the facts here to the date of the judgment confirming the verdict of the jury, to-wit, September 14, 1901, a date long prior to the issuing of the tax-bills, which were issued March 15, 1902. [In re Paseo, 78 Mo. App. 518.] The best that can be said for plaintiff's insistence touching this lien is that the lien of the tax bills attached conditionally to these lots; the condition of attachment being that the defendant would dismiss its condemnation case short of final judgment and payment of the money into court, as under the general law, absent a charter provision forbidding, it had the right to do. [State ex rel. v. Fort, 180 Mo. 97; Railroad v. Second Street Imp. Co. 256 Mo. 407.] The city did not so dismiss the proceeding and the right of the city temporarily suspended as we may express it, by the appeal, attached upon the affirmance here of the judgment of condemnation as of the date of such judgment. (In re Paseo, supra), and had the effect to convert these lots of private persons into integral parts of the highway, or street system of Kansas City, and to take them out of the category of property of private person upon which liens of tax-bills would attach; but since these lots became parts of public highways the judgment condemning them did not have the effect of converting them into that class of city property, the sewering of which created a liability against the city for which certificates evidencing such liability against the city were issuable by charter. [Sec. 14, Art. 9, Charter of Kansas City, 1898.]

If Walsh himself had sued for the tort of conversion alleged in effect by the briefs and contentions of counsel for plaintiff, a different and much more serious question would confront us; but it

seems idle to insist that upon the petition here and upon the
91 assignment above quoted, that plaintiff may recover upon the theory of tort. We have seen already how futile and idle is the view that plaintiff may recover upon contract. Moreover, no such tort is assigned. Nothing is assigned but the tax-bill and the lien thereof. The logic of the situation manifestly suggests the rule that all of the taxpayers of a city ought not to be taxed for the default of the city to properly levy a special improvement tax against the property of an infinitesimal part, (e. g. a sewer district) of such city. [1 Dillon, Munic. Corp. sec. 482; 1 Elliott, Roads and Streets, sec. 657.] There are on this point however a respectable number of authorities which adhere to the contrary view. [Fort Dodge Electric &c. Co. v. Fort Dodge, 115 Iowa, 568; Iowa Pipe & Tile Co. v. Callahan, 125 Iowa, 358; Barber &c. Co. v. Chicago, 139 Ill. App. 121; Barber &c. Co. v. Denver, 72 Fed. 336; City of Pontiac v. Talbot Paving Co. 94 Fed. 65; Donnelly v. Brooklyn, 121 N. Y. 9; Galveston v. Heard, 54 Tex. 420.] Cases from other jurisdictions which are not affected or hedged about by so many and such stringent, forbidding constitutional provisions, statutes and charter limitations, are of small, if any value in determining the question vexing us here. But be this as may be, the point of peculiarity in the instant case that plaintiff cannot in any event, recover upon any theory of contract, but that it must recover, if at all, upon the theory of liquidated compensation for a tort, which tort was not assigned to it and on which it does not sue, destroys in our view any helpful analogy between the above cases from other jurisdictions and this one at bar.

Neither are we impressed with the view that since it was under certain circumstances (which however, do not exist in the instant case), the duty of the defendant's Board of Public Works to issue certificates showing the liability of the city, that plaintiff, as the assignee of the contractor, in the absence of the performance of said Board of Public Works of the alleged duty to issue such
92 certificates, may sue the city upon a bare tax-bill issued against the property of private citizens. If the lots upon which the liens are averred to exist had been purchased or taken and condemned by the city for a park or for a city hall, or for some such use as produced in the city a title in fee, then it would have been the duty of the Board of Public Works to issue certificates for the city's proportionate part of the cost of the improvements. [Sec. 14, Art. 9, Charter of Kansas City, 1898.] But as a park-way is a street, or highway of a certain kind and not a park within the purview of the above section of the charter, (Kleopfert v. City of Minneapolis, 90 Minn. 158; Century Dictionary,) the said Board of Public Works neither issued, nor had authority to issue any certificate on behalf of the city thereon. It is clear therefore, that no liability can arise upon a tax-bill, regarded as merely standing in the place of such a certificate, when the issuance of such certificate itself would have been unwarranted.

The Missouri cases cited are not in point. The case of Oster v. City of Jefferson, 57 Mo. App. 485, was a suit upon contract and for

the contract price of doing certain macadamizing, curbing and guttering; and not upon an assigned tax-bill; besides this the case rode off upon the peculiar terms of the statute (now changed by amendment) under which the work was done.

The case of Fisher v. City of St. Louis, 44 Mo. 482, was a suit upon contract and not an action either upon a tax-bill or by the assignee of a tax-bill. Besides, the cause of action accrued and the action was brought prior to the adoption of our present Constitution.

Neither the case of In re Paseo, 78 Mo. App. 518, cited and strongly relied on by plaintiff, nor that of Ross v. Gates, 183 Mo. 338, cited and largely relied on by defendant, is in our view, decisive of the questions in this case. In fact in the Ross-Gates case it is
93 affirmatively found by this court that the jury which sat in the condemnation suit took into account and added to their award, the increase in value of the condemned property by reason of the identical improvement represented by the tax-bills there sued on. Manifestly then no two views could exist as to the right of the holder of the tax-bill to recover such excess sum so held out of the award by the city. A further comparison of the chronology of the happenings in the case at bar with those in the two cases supra, so strongly relied on respectively by counsel on opposing sides here, discloses such a difference as to make them of little value, unless it be upon the point whether plaintiff was entitled to a lien upon the jury awards to pay his tax-bills. If we were to follow the case of In re Paseo, supra, we must needs hold that no lien attached in favor of Walsh or his assignee upon the award made upon condemnation of the several lots against which the tax-bills were issued. But the latter point is not in the instant case; besides the difference in the nature of the action at bar and that in the said case of In re Paseo, would make it wholly unnecessary for us to pass, and we do not pass, upon the latter question. But let us look to these several facts: In the instant case the ordinance of condemnation was passed October 3, 1899; the contract for the construction of the sewer was made with Walsh on February 28, 1901. The jury in the condemnation suit rendered its verdict June 8, 1901; judgment was entered thereon September 14, 1901; two persons—Mastin and another, charged with a part of the betterment expenses, but whose property was not condemned—appealed; the tax-bills were issued to Walsh March 15, 1902, and this court affirmed the condemnation suit on Mastin's appeal on June 4, 1902. [Kansas City v. Mastin, 169 Mo. 80.]

In the Paseo case the ordinance condemning the Scarritt land and other lands was passed on November 15, 1895; the paving and curbing ordinances were passed October 16, 1895, and November
94 23, 1895, respectively; (the date of the contract for the improvements does not appear:) the verdict of the jury of condemnation was rendered September 26, 1896, and judgment was entered thereon on November 14, 1896, and subsequently, on to-wit, the 16 December, 1896 and the 1 April, 1897, respectively, the tax-bills were issued to the contractor.

In the case of Ross v. Gates, supra, the condemnation ordinance

passed November 13, 1895; the contract for the paving was made December 24, 1895; the tax-bills were issued December 15, 1896; the verdict of the jury condemning the land was rendered January 23, 1899, and judgment followed January 13, 1900, and the jury took into consideration the amount of the several tax bills, and added the same to their award.

We feel no manner of doubt that defendant may not be held under the law in this sort of action for this sort of claim ~~such as we may deprecate the palpable dishonesty such a condition of the law permits to be *in perpetuated*~~. [Cotter v. Kansas City, 251 Mo. 229; Likes v. Rolla, 167 S. W. 645, not yet officially reported; Thornton v. Clinton, 148 Mo. 648.]

Pertinent to the inherent, or at least apparent unfairness and hardship of the uniform enforcement of these hard and fast rules, the learned Springfield Court of Appeals, in the case of Likes v. Rolla, supra, at page 648, in a well considered opinion by Sturgis, J., said:

"The apparent hardship and injustice resulting to one who has acted in good faith, arising from enforcing the strict rules laid down by our statutes in making contracts with public corporations, has often been weighed against the abuse and squandering of public money growing out of a disregard of such restrictions. We refer any interested reader to Crutchfield v. Warrensburg, 30 Mo. App. 456, and Cotter v. Kansas City, supra. It is sufficient to say that this state has tried both systems, and until the Legislature sees fit
95 to adopt a less strict rule, or permits the courts to do so, we must enforce the laws as we find it."

In the case of Cotter v. Kansas City, supra, at page 230, our learned Commissioner Roy of this Division, said:

"We appreciate the hardships of this case. At the same time we call attention to the fact that both parties to the contract acted in apparent good faith. Both contemplated the possibility that the special tax bills might be invalid; and it was mutually agreed that the city should in no event be liable."

It follows from what is said that this case must be reversed, which is accordingly ordered.

Walker and Brown, JJ., concur.

C. B. FARIS, *P. J.*

The foregoing opinion of Faris, P. J. written in Division No. 2, is concurred in and adopted as the opinion in Court in Banc.

Brown, Bond, Walker and Blair, JJ. concur. Woodson, C. J. dissents. Graves, J. dubitante.

A. M. WOODSON,
Chief Justice.

96' In the Supreme Court of Missouri, October Term, 1915.
In Banc.

And thereafter, to-wit, on November 13th, 1915, the following further proceedings were had and entered of record in said cause:

16831.

"MUNICIPAL SECURITIES CORPORATION, Respondent (P. E.),
vs.
KANSAS CITY, Appellant (D. E.).

Now at this day there is presented to Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of Missouri, in Chambers, by the said Respondent, (P. E.) a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an Assignment of Errors, and Citation to the said Appellant (D. E.) citing it to be and appear in the Supreme Court of the United States not exceeding thirty days from and after the date thereof; which said Writ of Error is allowed, said Assignment of Errors ordered filed and said Citation signed and ordered issued."

And thereafter, to-wit, on November 22nd, 1915, the following further proceedings were had and entered of record in said cause:

"MUNICIPAL SECURITIES CORPORATION, Resp. (P. E.),
vs.
KANSAS CITY, App. (D. E.).

Now at this day comes again the said Respondent, (P. E.), by attorney, and presents to the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of Missouri, in Chambers, its bond herein for the sum of Two Hundred and Fifty Dollars; which said bond is approved and ordered filed. Come now the said parties by their attorneys, and file their stipulation as to transcript of record herein to be filed in the Supreme Court of the United States."

97 A copy of which said bond is in words and figures as follows:

In the Supreme Court of the United States.

MUNICIPAL SECURITIES CORPORATION, Plaintiff in Error,
vs.
KANSAS CITY, Defendant in Error.

Bond.

Know all Men by these Presents, That we, Municipal Securities Corporation, a corporation, as principal and Willis C. Allen, as surety, are held and firmly bound unto Kansas City, and its successors, in the sum of Two Hundred and Fifty Dollars, to be paid to said obligees, their successors, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our

heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of November, A. D. 1915.

Whereas, the above named Municipal Securities Corporation, the plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment heretofore rendered in the above entitled cause by the Supreme Court of the State of Missouri;

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect and answer all costs and damages if it
98 shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

MUNICIPAL SECURITIES CORPORATION,
By WALTER DAVIS, *Vice-President.*
WILLIS C. ALLEN.

Approved:
JAY M. LEE,
Ass't City Counsellor.

99 Which said stipulation is in words and figures as follows, to-wit;

In the Supreme Court of Missouri.

No. 16831.

MUNICIPAL SECURITIES CORPORATION, Plaintiff in Error,
vs.
KANSAS CITY, Defendant in Error.

Stipulation as to Transcript of Record on Writ of Error.

It is stipulated between Municipal Securities Corporation and Kansas City, parties to the above entitled suit and to the writ of error prosecuted upon this record to the Supreme Court of the United States by the Municipal Securities Corporation, for the purpose of reducing the size of the record to be printed herein, that the following portions of the record shall be incorporated into the transcript of the record on the writ of error and none other, and that the clerk of this court shall transmit to the Supreme Court of the United States as the transcript of the record in the case only those portions herein designated, that is to say:

1. The writ of error.
2. Citation and service.
3. Assignments of error.
4. Those portions of the appellant's printed abstract of the record attached hereto which are not eliminated by cancellation and the interlineations in such printed abstract.

5. The order and judgment of Division 2 of the Supreme
100 Court of Missouri determining the cause.

6. The motion for rehearing filed by the Municipal Securities Corporation, including the date of such filing.

7. All subsequent orders of Division No. 2 of the Supreme Court of Missouri relative thereto.

8. The orders of the Supreme Court in banc determining the cause.

9. The opinion filed in the court in banc.

A. F. EVANS,
JAY M. LEE,
Attorneys for Defendant in Error.
SCARRITT, SCARRITT,
JONES & MILLER,
Attorney- for Plaintiff in Error.

100½ [Endorsed:] No. 16831. Municipal Securities Corporation vs. Kansas City. Stipulation as to Transcript of Record on Writ of Error. Filed Nov. 22, 1915. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

101 STATE OF MISSOURI, *ss:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and correct transcript of the record and papers filed in the case of Municipal Securities Corporation v. Kansas City as the same appear of record and on file in my office, and as called for in the stipulation concerning the transcript of record, to be filed in the Supreme Court of the United States, in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri. Done at office in the City of Jefferson, State aforesaid, this — day of November, 1915.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

Endorsed on cover: File No. 25,019. Term No. 736. Municipal Securities Corporation, plaintiff in error, vs. Kansas City. Filed December 2d, 1915. File No. 25,019.

No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

MUNICIPAL SECURITIES CORPORATION,
PLAINTIFF IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

File No. 25019.

SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS.

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Plaintiff in Error.

No. 56.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

MUNICIPAL SECURITIES CORPORATION,
PLAINTIFF IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS.

The motion of the defendant in error to dismiss the writ of error for want of jurisdiction is not well taken.

We beg to refer to printed Statement, Assignments of Error and Brief for Plaintiff in Error for the nature and elements of this suit and the Federal questions involved.

1. It is well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recog-

nized and enforced, would require a judgment different from one resting upon some ground of local or general law.

Chicago, B. & Q. Ry. Co. v. *Illinois*, 200 U. S. 561, 580.
Murdock v. *Memphis*, 20 Wall. 590, 636.
Anderson v. *Carkins*, 135 U. S. 483.
Des Moines N. & R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Eustis v. *Bolles*, 150 U. S. 361, 364.
Wabash R. Co. v. *Pearce*, 192 U. S. 179.
Terre Haute & I. R. Co. v. *Indiana*, 194 U. S. 579.
Schlemmer v. *Buffalo, R. & P. Co.*, 205 U. S. 1.
Holden Land, etc., Co. v. *Interstate Trading Co.*, 233 U. S. 536, and particularly the dissenting opinion of Mr. Justice Day.

2. Where a contract is alleged to have been impaired by the instrumentalities or activities of a state, this court will put its own construction upon the contract though it may differ from that of the Supreme Court of the State.

Citizens Bank v. *Parker*, 192 U. S. 73.
Terre Haute & Ind. R. Co. v. *Indiana ex rel. Ketcham*, 194 U. S. 579.
Yazoo & M. Valley R. Co. v. *Adams*, 180 U. S. 41, 44.
Mobile & O. R. Co. v. *Tennessee*, 153 U. S. 486.
Wilson v. *Standefer*, 184 U. S. 399, 411, 412.
Chapman v. *Goodnow*, 123 U. S. 540, 548.
Grand Rapids & I. R. Co. v. *Osborn*, 193 U. S. 17.
McCullough v. *Virginia*, 172 U. S. 102, 109.

3. The provisions of the Fourteenth Amendment refer to all the instrumentalities of the state, including its legislative, executive and judicial authorities.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Respectfully submitted,

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Plaintiff in Error.

19

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

MUNICIPAL SECURITIES CORPORATION,
Plaintiff in Error,

v. No. 56

KANSAS CITY,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

J. A. HARZFELD,
A. F. SMITH,
JAY M. LEE,
Attorneys for Defendant in Error.

John C. Bovard, Printer, 722 Baltimore Ave., Kansas City, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

MUNICIPAL SECURITIES CORPORATION,

Plaintiff in Error,

v. No. 56

KANSAS CITY,

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Defendant in error moves the Court to dismiss the writ of error herein because this Court does not have jurisdiction of this cause.

The Missouri Supreme Court did not decide in this case that there was no way by which plaintiff in error, or its assignor, by timely and proper proceedings, could procure compensation for the work for which the tax bills sued on were issued. It did decide (265 Mo., 252) that if such a cause of action existed it could not be enforced by the plaintiff in error in the form of action which the plaintiff in

error had chosen. The decision was based on points presenting no federal question, and therefore there is nothing before this Court for review.

Commercial Bank v. *Rochester*, 15 Wall. 639;
De Saussure v. *Gaillard*, 127 U. S., 216, 232 *et seq.*;
Eustis v. *Bolles*, 150 U. S., 361;
Leathe v. *Thomas*, 207 U. S., 93;
Elder v. *Wood*, 208 U. S., 226, 232, 233;
Cincinnati etc. Ry. Co. v. *Slade*, 216 U. S., 78;
Texas etc. Co. v. *Miller*, 221 U. S., 408, 416;
Brinkmeier v. *Mo. Pac. Ry. Co.*, 224 U. S. 268, 270;
Holden etc. Co. v. *Inter-State etc. Co.*, 233 U. S., 536;
Washington v. *Miller*, 235 U. S., 422, 429;
Mellon Company v. *McCafferty*, 239 U. S., 134.

Respectfully submitted,

J. A. Harzfeld,
A. F. Smith,
Jay M. Lee,
Attorneys for Defendant in Error.

No. [redacted]56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

MUNICIPAL SECURITIES CORPORATION,
PLAINTIFF IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

File No. 25012.

STATEMENT, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM G. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Plaintiff in Error.

SUBJECT INDEX.

Authorities.

No. 736.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

MUNICIPAL SECURITIES CORPORATION,
PLAINTIFF IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

File No. 25019.

STATEMENT, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The Federal Question.

The original suit is an action at law wherein the plaintiff in error claims to have purchased and become the owner of certain special tax bills issued by the proper officers of Kansas City, the defendant, against certain lots or tracts of land then owned by private individuals, as the proper share of the contractual cost of a certain district sewer to be borne by such lots or tracts of land,

and that after such issuance and ownership occurred Kansas City by its affirmative acts took possession of the lots so assessed and converted them, together with other lands, into a public parkway and improved them as such, and now holds them as public property for that use; and that the public policy of Missouri is such that municipal property cannot be levied upon or sold for the purpose of enforcing such special tax liens; and as a consequence the plaintiff has by that affirmative conduct of the city been deprived of its remedy of enforcing its lien by sale of the property so assessed—the only remedy provided by the charter of Kansas City —and being emasculated of the characteristic remedy, the tax bills as such, and the property evidenced by them, viz., enforcible liens, have vanished. Kansas City has refused to make good to the plaintiff the amount or value of these special assessments, claiming that it is without charter authority to pay such claims. By this suit plaintiff seeks to recover from Kansas City the value of its property, that is, the value of those special tax liens of which it has been deprived by the affirmative acts and conduct of Kansas City. The involved facts are in no way contested or disputed, the only controversy being as to the proper legal conclusions to be drawn from the facts.

The plaintiff in error claims that when it acquired the special tax bills in suit they constituted municipal securities in the nature of contracts between it as purchaser and holder as one party thereto and the defendant, Kansas City, as the maker and the other party thereto. These were acquired by plaintiff in error for full value, and Kansas City when it executed and issued them received full value therefor. Under the interpretation put by the Supreme Court of the State upon the official acts and charter of Kansas City these contracts while they were confessedly used by Kansas City to discharge a valid obligation were worthless when the time of their enforcement came. The taking of this property by a state through state agencies without making any compensation therefor violated the rights of the plaintiff in error under the Fourteenth Amendment.

This court has jurisdiction of the case because the Supreme Court of Missouri has denied the claim of Federal right expressly set up by the plaintiff in error in its petition in the original suit, and in the instructions or declarations of law asked by the plaintiff and given by the trial court, and in its motion for a rehearing in the Supreme Court of the State. The petition of the plaintiff in the

original suit, plaintiff in error here, upon which the case was tried, after narrating in order the facts in which the controversy is involved, expressly alleged:

That "Kansas City cannot by an act of itself not consented to by the plaintiff, either by judicial proceedings in the nature of the condemnation or otherwise, destroy the plaintiff's right to collect the cost of the said work according to its said contract (that is, through the tax bills), and in support of this claim the plaintiff invokes the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and against the acts of states."

And at the conclusion of the trial, the plaintiff asked an instruction or declaration of law, which by that court was allowed, but which in effect was disallowed by the Supreme Court of Missouri, which instruction is as follows:

"The court declares the law to be that this is an action at law wherein and whereby the plaintiff claims and asserts that the defendant, Kansas City, a municipal corporation organized and existing under and by virtue of the laws of Missouri, and as an agency of said state, has by its official acts, ordinances and conduct, appropriated to public use the property and property rights of the plaintiff, which property rights consisted of valid, subsisting liens against certain real estate of the value of more than $5000, without making just compensation, or any compensation therefor, and has thereby deprived the plaintiff of its said property without due process of law and contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States and especially that part thereof inhibiting states from depriving a person of his property without due process of law, and contrary to the bill of rights of the State of Missouri to the effect that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation."

The Facts.

There is no dispute as to the facts in which this controversy is involved. They are these: Defendant, Kansas City, by its ordinance approved January 24, 1901, required that a district sewer should be constructed in sewer district No. 146 in that city, and that a contract should be entered into for that work. A contract for the work conformable to that ordinance was subsequently duly entered into between the city and one Michael Walsh, and that contract stipulated that the city would pay to the contractor a

stated sum of money per piece for all work executed, and that the whole sum, which amounted to $71,521.32, would be paid in special tax bills to be issued by the defendant City according to law and delivered to the contractor upon the completion and acceptance of the work. Under the Kansas City Charter a special tax bill evidences a paramount lien against the lot or tract of land described therein to the amount stated in the special tax bill. In due time the contractor completed the work in compliance with his contract and the work was duly accepted by the City. The total amount of the contract price was duly computed by the Board of Public Works of that city, and that Board, conformable to its charter powers, executed and issued special tax bills for appropriate amounts, the aggregate of which equaled the contract price, and the contractor accepted them as being what they purported to be and gave to the city his receipt therefor in full for the contract price. These tax bills were issued and delivered to the contractor on March 15, 1902, and the contractor thereupon duly sold and assigned the same for full value to the plaintiff in error, who has continued to own and hold them since that time. All of the special tax bills so issued have been paid except those involved in this suit. At the time the tax bills involved in this suit were issued the lots charged by those tax bills were in the quiet and undisputed possession of private owners as their own private property. A copy of one of these special tax bills, and they are all similar in form, is set out on pages 16, 17 and 18 of the printed Transcript of Record.

The charter provisions of Kansas City relative to the issuance and effect of such special tax bills are set out in the marginal note.

Note:—The Kansas City Charter is the organic law of the city relative to local municipal affairs, having been adopted by a vote of its people conformable to Section 16, Article 9, of the State Constitution. It has the same effect in law as an act of the legislature in lieu of which it stands (Charter and Ordinance of Kansas City, 1898):

Section 10, Article 9 of that Charter is as follows:

"District sewers shall be constructed within the limits of the districts heretofore or hereafter established by ordinance, as each case may be. Any sewer district heretofore or hereafter established may be sub-divided, enlarged or changed by ordinance at any time previous to the construction of any district sewer therein. But no such district shall be subdivided, enlarged or changed after a district sewer shall have been constructed therein. The city may, with the approval of the board of public works, from time to time cause a district sewer, or sewers, to be constructed in any sewer district heretofore or hereafter established, whenever the common council may deem such sewer necessary for sanitary or other purposes, and such sewer or sewers shall be of such dimensions, material and character as shall be prescribed by ordinance, and any district sewer heretofore or hereafter constructed may be changed, diminished, enlarged or extended, and shall have all the necessary laterals, inlets and other appurtenances which may be required.

The city by its ordinance No. 13067, entitled "An ordinance to open and establish a public parkway in the South Park District in Kansas City, Missouri, known as the Paseo Extension," approved October 3, 1899, undertook to condemn certain designated lots or tracts of land owned by private individuals, consisting of many acres, as a parkway, including among other lands all of the lots or tracts of land assessed by the tax bills involved in this suit, and fixed a benefit district within which other lands should be assessed to pay the condemnation price thereof. Condemnation proceedings were begun by Kansas City under that ordinance in

As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax against each lot in the district. The city shall in no event nor in any manner whatever be liable for or on account of the cost of the work done in constructing, changing, diminishing, enlarging or extending any district sewer except as hereinafter provided."

Section 16, Article 9, of that Charter, is as follows:

"The board of public works shall, after making out and certifying any special tax bills as aforesaid, in this article provided for, cause the same to be registered in full in their office and deliver such special tax bills to the party in whose favor made out for collection and take the receipt of such party therefor at the foot of the register in full of all claims against the city on account of the work for which such tax bills have been made out."

Section 18, Article 9, of that Charter, provides:

"Every tax bill and the lien thereof shall be assignable and every assignee may sue in his own name. * * * Every tax bill shall in any suit thereon be *prima facie* evidence of the validity of the bill, of the doing of the work and of the furnishing of the material charged for and of the liability of the land to the charges stated in the bill. In a suit on any special tax bill the judgment shall be special that the plaintiff shall recover the amount found due including interest, together with costs, to be levied and made off the land described in the tax bills, and a special execution shall issue to sell the land to pay any such judgment, interest and costs."

Section 14, Article 9, provides:

"When the city shall own in fee simple absolute any lot or parcel of land, or hold any lot not *used* as a street, avenue, alley or public highway, it shall out of the general fund pay its proper share of the cost of any such work to be paid for in special tax bills as though a private owner of such land, but there shall be no tax bill against any land so owned or held by the city. The Board of Public Works shall ascertain the share for which the city shall be justly liable, and the amount so ascertained shall be certified to by the Board of Public Works."

the Circuit Court of Jackson County, Missouri, and a trial was had and a verdict returned in that proceeding on June 8, 1901; which verdict fixed the value of each tract of land condemned and the amounts that other lands in the benefit district were assessed as benefits. At this date the sewers in question were not built and they were not completed until March 15, 1902, and hence the award for the condemned lands did not include the value which subsequently accrued to those lands by the construction of these sewers. Motions for a new trial and in arrest were filed in that proceeding and were overruled and the verdict therein was confirmed by the trial court on September 14, 1901, and judgment was then entered to the effect that Kansas City, upon paying the awarded value of the condemned lands, should have and hold the same for public use. Appeals from that judgment were duly prosecuted to the Supreme Court of the state. On hearing the appeal the Supreme Court affirmed the judgment of the Circuit Court on June 4, 1902, and on June 23, 1902, the mandate of the Supreme Court to that effect was filed in the Circuit Court. The tax bills in question had previously to this time, viz: on March 15, 1902, been issued by Kansas City, the plaintiff in the condemnation suit and purchased and acquired by the plaintiff in error. On March 15, 1902, no part of the awards in the condemnation case had been paid and the City was not then the owner or entitled to the possession of any of the lands charged by these special tax bills and sought to be condemned. On September 5, 1903, final judgment was entered in the Circuit Court reciting the payment by Kansas City of the condemnation awards and divesting the property owners of their title in the lands condemned including the lands charged by these tax bills and vesting the same in Kansas City for public purposes of a parkway forever.

The City Charter relative to judgments and appeals in parkway condemnation cases provides as follows:

Section 17, Article 10, of the Kansas City Charter, 1898, provides:

"The verdict, unless set aside as aforesaid, shall be confirmed and judgment entered thereon that the city have and hold the property sought to be taken *upon payment of the compensation assessed therefor*, for the purpose specified in the ordinance providing for said improvement, and that the city pay the benefits assessed against said city, and that the city recover the respective amount assessed against the private property, and that the several lots and

parcels of private property so assessed to pay compensation by the verdict stand severally charged and be bound for the payment of the respective assessments and the interest that may accrue thereon."

Section 18 of the same article provides: "In case of appeal, the judgment shall stand suspended until the appeal is disposed of, and no interest shall be allowed or collected on the judgment or on the assessments until such judgment be affirmed or appeal be dismissed. No writ of error shall be allowed," etc.

Section 19 of the same article provides:

"The common council shall have the power, with the concurrence of the Board of Park Commissioners, at any time before any of the parties assessed with benefits shall have paid the amount so assessed, to repeal the ordinance ordering the proposed improvement, if such repeal be denied for the best interests of the city; and in such event the judgment for compensation and benefits shall be void."

Section 28 of the same article provides:

"The city shall not be entitled to the possession of any lot or parcel of property taken under the provisions of this article until full payment of the compensation therefor, as determined, be made or paid into court for the use of the persons in whose favor such judgment may have been rendered, or who may be lawfully entitled to the same; and upon such payment as aforesaid, such Circuit Court, or judge thereof, in which proceedings were had, shall immediately order, adjudge and decree that the title in fee to, and every other interest in the land so condemned and taken for such park, road, boulevard, avenue or public use be divested out of such owner and other persons interested and vested forever in the city to the use of such park district or districts; and the court shall thereupon, without delay, put the city in the possesion thereof," etc.

The Missouri Constitution, Article 2, Section 21, provides:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; *and until the same shall be paid to the owner, or into court for the owner the property shall not be disturbed or the proprietary rights of the owner therein divested,*" etc.

The Pleadings.

The petition set up all the facts herein related and invoked the protection of the Federal constitution as hereinbefore recited and

prayed judgment for the amount of its special tax liens which Kansas City had rendered uninforcible.

The answer of the City to the plaintiff's petition, after admitting its own corporate capacity, recites that it "denies each and every allegation in said amended petition contained except such as herein stated." It expressly admits and "states that on the 15th day of March, 1902, *it did issue to Michael Walsh tax bill number* 84 on Lot 1, Block 1, C. H. Pratt's Vine Street Addition *and the other special tax bills mentioned in the petition;* * * * "Defendant further states that the charter of Kansas City, Article IX, Section 14, provides a method by which Kansas City shall pay its share of the cost of any public improvement on land owned in fee simple by it, and said charter provides that the same shall be done by the issuance of tax certificates after the city's proportion of the cost shall have been ascertained and certified to by the Board of Public Works; that no certificate was issued by defendant on Lot 1, Block 1, C. H. Pratt's Vine Street Addition, or on any of the other lots described in the petition herein; that the Board of Public Works did not ascertain and certify an amount due; that *it did not find that Lot* 1, *Block* 1, C. H. Pratt's Vine Street Addition or any other of the said lots mentioned in the petition, *was owned in fee simple absolute by Kansas City;* that there was no compliance with Article IX, Section 14, of the Charter of Kansas City, and no obligation created thereunder." It pleads that Walsh executed a full release of Kansas City for the contract price of the sewer when the issue of special tax bills, aggregating in face value the contract price, were delivered to him; and no other defense is pleaded.

The Trial.

A trial was had upon these pleadings to the court without a jury, a jury having been waived. Plaintiff at the trial asked four declarations of law, one of which was a peremptory instruction to find for the plaintiff, and all of them were given, and judgment was entered in favor of the plaintiff against Kansas City, the defendant, for the full amount of the claim. No complaint was made by the defendant in its motion for a new trial in the trial court (there was no motion in arrest filed) to the giving of any of these declarations of law. From these declarations of law it appears that the trial court adopted the theory that the special tax bills in evidence could not be lawfully collected from those per-

sons who were the owners of the property described therein respectively at the time of the trial in the condemnation proceeding, nor from the award allowed as damages to such owners as compensation for their lands so taken; and that the lands described in the several tax bills were, at the time of the issuance of those tax-bills, to-wit, March 15, 1902, owned and in the possession of certain individuals as their private lands and as a consequence were not then owned by Kansas City, and that the said tax bills were well issued against the tracts of land therein described respectively, and that the defendant city under and by virtue of the ordinances and court proceedings in evidence subsequently to the issue of such tax bills took possession of the lands so charged and assessed and appropriated the same to public use (thereby under the Missouri public policy rendering them exempt from sale under special execution), and that the said city could not thereby consistently with the provisions of the Fourteenth Amendment to the Constitution of the United States and the bill of rights of Missouri deprive the owner of the tax bills of its property rights therein without giving just compensation therefor. And that judgment should go against defendant City for the amount of loss it had caused by destroying these securities.

The Appeal: Reiteration of Federal Right.

From the judgment in favor of the plaintiff in the trial court, the defendant, the City, appealed to the Supreme Court of the state, which court had jurisdiction because a Federal question is involved in the case. The appeal was first heard and determined in Division Two of that court, where in an opinion rendered by Judge Faris, the judgment below was reversed. A motion for rehearing was then filed by the plaintiff in error wherein the claim of federal right was again renewed (Transcript of Record p. 33), and thereupon the cause was transferred to the Supreme Court *in banc*, which is the highest court of the state. After reargument the divisional opinion was adopted as the opinion of the court *in banc*. Chief Justice Woodson dissenting and Judge Graves standing *dubitante;* and the marvelous spectacle is exhibited of the court acknowledging that their decree works dishonesty, for in their opinion we read the conclusion that "Defendant may not be held under the law in this sort of action for this sort of claim MUCH AS WE DEPRECATE THE PALPABLE DISHONESTY SUCH

A CONDITION OF THE LAW PERMITS TO BE PERPETRATED" (Transcript of Record pp. 52, 34). But the plain law is that no state may deprive a person of his property without due process of law, that is, *dishonestly*. In this suit, therefore, is drawn in question the validity of a statute or statutes (for the Kansas City Charter has the effect of a statute) or an authority exercised under the State of Missouri on the ground of their being repugnant to the Constitution of the United States and the decision of the highest court of the state was in favor of their validity.

From the judgment of that court the plaintiff therein prosecutes this writ of error.

ASSIGNMENTS OF ERROR.

The Supreme Court of Missouri in ruling this cause erred in the following respects:

1. In reversing and annulling the judgment of the Circuit Court of Jackson County, Missouri, in favor of the plaintiff and against the defendant, and thereby deciding against the title and right expressly set up and claimed by the plaintiff in its petition in the cause, and in the declarations of law presented and allowed by the trial court, and in its brief and argument and its motion for rehearing filed in the Supreme Court in the State of Missouri, to the effect that, upon the facts pleaded and proved as disclosed by the record, Kansas City, a municipality and agency of the State of Missouri, had deprived the plaintiff of its property without due process of law contrary to the declarations of the Fourteenth Amendment to the Constitution of the United States to the effect that no state may deprive a person of his property without due process of law and was liable to make just compensation therefor.

2. In holding, determining and adjudging that the judgment, rendered and entered by the Circuit Court of Jackson County, Missouri, in the cause in favor of the plaintiff and against Kansas City, the appellant, was not supported by the pleadings and proof and was erroneous, and in reversing and annulling the said judgment, when in so doing they denied the assertion of the plaintiff that its right and property in and to the subject matter of the suit, viz., certain special tax bills, were, by the undisputed facts disclosed by this record, shown to have been taken from it by Kansas City and the State of Missouri without making any compensation therefor, contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States against depriving a person of property without due process of law.

3. In denying the claim of Federal right expressly set up in the plaintiff's petition in the said cause to the effect that defendant Kansas City became and is liable to pay the amount due on certain tax bills because Kansas City by its own acts and conduct not consented to by the plaintiff, did by administrative and judicial proceedings in the nature of condemnation proceedings, destroy the plaintiff's right to collect the cost of certain public work according to its own contract therefor and to enforce the lien of

certain tax bills issued pursuant to such contract by taking possession of the real estate affected by such liens and devoting the same to a public use and did thereby deprive plaintiff of its property in such special tax bills, contrary to the Fourteenth Amendment to the Constitution of the United States guaranteeing to the plaintiff the protection of its property by due process of law and as against the acts of states.

4. In denying the claim of Federal right expressly asserted by the plaintiff in its declaration of law requested and given by the Circuit Court of Jackson County, Missouri, to the effect that if the lands described in the several special tax bills in evidence were, at the time of their issuance, to-wit, March 15, 1902, owned and were in the possession of certain individuals, and that the said special tax bills became and were when issued valid liens against the tracts of land therein respectively described, and that thereafter Kansas City, the defendant, under and by virtue of the ordinances and court proceedings in evidence acquired the said lands and took possession thereof and devoted the same to a public use, and so deprived the plaintiff of the power in the state courts of enforcing such special tax bills, then the said city contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States did deprive the plaintiff as owner of such certificates or tax bills of its property rights therein and the finding should be for the plaintiff.

5. In denying the claim of Federal right expressly asserted by the plaintiff in its declaration of law requested and given by the Circuit Court of Jackson County, Missouri, to the effect that this is an action at law wherein and whereby the plaintiff claims and asserts that the defendant, Kansas City, a municipal corporation organized and existing under and by virtue of the laws of Missouri, and as an agency of said state, has by its official acts, ordinances and conduct appropriated to public use the property and property rights of the plaintiff, which property rights consisted of valid, subsisting liens against certain real estate of the value of more than $5000, without making just compensation, or any compensation therefor, and has thereby deprived the plaintiff of its said property without due process of law, and contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States, and especially that part thereof inhibiting states from depriving a person of his property without due process of law.

6. In holding, determining and adjudging in effect that special tax bills duly issued by defendant, Kansas City, evidencing valid liens for a stated sum of money against certain real property and which were delivered and used by Kansas City to satisfy and discharge its obligation under a valid contract with the contractor for a public improvement, and which tax bills were accepted by such contractor for that purpose, might, by subsequent acts and subsequent conduct of that city not consented to by the lien holder, be rendered nugatory and the lien thereof be extinguished by the act of the said city in taking possession of the real property affected by the liens and devoting the same to a public use with the effect that under the laws and public policy of Missouri, which do not permit the sale of property devoted to a public use, such special tax liens could not be enforced against such real estate, and such special tax bills were thereby rendered valueless, without making any compensation therefor to the owner, and in holding and adjudging that there was no merit in the claim expressly set up by plaintiff that such acts of the State of Missouri and Kansas City, an agency of such state, did by this means deprive it of its property in such tax bills and in the lien thereof contrary to the guaranties of the Fourteenth Amendment to the Constitution of the United States to the effect that no state shall deprive any person of his property without due process of law.

7. In not sustaining the respondent's claim and invocation of the Fourteenth Amendment to the Constitution of the United States guaranteeing the protection of its property by due process of law and as against the acts of the State of Missouri and Kansas City, its agency, in the protection of its property and property rights in the certain special tax bills issued by Kansas City and the lien thereof mentioned in the plaintiff's petition, and in adjudging that although the said tax bills were rendered non-enforcible by the acts of Kansas City the plaintiff nevertheless was not deprived of its property without due process of law contrary to such constitutional guarantee.

BRIEF.

I.

Kansas City executed and issued the special tax bills constituting the basis of this suit and expressly certified that they evidenced liens against the lands described in them and got full value for them; and they were therefore property within the protection of the Federal Constitution.

The contract between Kansas City and Walsh for the construction of the sewer in question required that the contractor furnish the necessary labor and materials and complete the sewer in accordance with the specifications therefor, and thereby the city agreed that, upon the completion of this work to the satisfaction of its city engineer, the contractor would "then receive pay according to the above schedule of prices (which were duly set out) in certified bills of assessments of special taxes against and upon the lands in said sewer district, as provided by law, and that his receipt therefor shall be in full of all claims against the city on account of said work." And the city thereby further stipulated that these special tax bills shall be "payable and collectible in all respects in compliance with the provisions of Section 23, Article IX of the Charter of Kansas City" (Transcript of Record p. 12); which charter provision specifies that these tax bills may be enforcible by suit *in rem* by the owner thereof and through a special execution to sell the lands to enforce the tax bills as paramount liens against the lands so charged. No personal judgment is authorized in suits to enforce special tax bill liens.

Walsh, the contractor, upon the completion and acceptance of the work accepted such tax bills from Kansas City having a par value equivalent to the full contract price.

These tax bills are assignable under the Kansas City Charter, and upon acquiring them Walsh duly sold and assigned them for full value to the plaintiff in error. And when plaintiff in error acquired them a contractual relation was at that moment initiated between Kansas City and it as the holder of those bills, and that contract was evidenced by the official records of Kansas City relative to the issue of those bills, and the recitations upon the face of the bills themselves, and the provision of the Kansas City Charter relative to such special tax bill assessments, and the material parts of that record are these:

"The Board of Public Works certifies (that is, Kansas City certifies, because the Board of Public Works is a department authorized to speak for Kansas City in that respect) that it has apportioned the cost of this work of constructing a district sewer in Sewer District No. 146 as provided by Ordinance No. 16219, approved January 24, 1901, showing the cost of $71521.32 * * * and apportioned the same among the several lots and parcels of land to be charged therewith, charging each lot or parcel of land with the proper cost; said apportionment is now certified to the city treasurer; the tax bills according to said apportionment are made out, certified and registered and the city engineer is ordered to deliver them to the party in whose favor made out for collection and then take the receipt of said party therefor. * * * The tax bills, therefore, according to such computation, apportionment and charge are made out, certified and registered, and the city engineer is ordered to deliver them to the party in whose favor made out for collection and then take the receipt of such party therefor" (Transcript of Record, p. 15).

The said tax bills were therefore duly issued, and each recites on its face that a certain tract of land has been charged with a stated sum "as a special tax for constructing a sewer in Sewer District No. 146," and "that said work has been completed according to contract by Michael Walsh, contractor, to whom this special tax bill is issued *in part payment therefor*, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land as provided by law for its proportion of the cost of such work as a lien against said land," etc. (Transcript of Record, p. 17).

The charter of Kansas City provides only one method of enforcing such special tax bill liens, viz., by a suit in which "the judgment shall be special that the plaintiff shall recover the amount found due, including interest, together with costs, to be levied and made off the land described in the tax bill, and a special execution shall be issued to sell the land to pay any such judgment, interest and costs" (Section 18, Art. IX, Kansas City Charter, quoted in the margin).

Kansas City, therefore, expressly represented and certified in its official records that the lands against which these special tax bills were issued were on the date of the issue private lands of individual owners; it recited and certified that they were issued according to the Charter of Kansas City and were payable and collectible as therein provided; that is, by judicial sale under special execution. It is true in fact, and upon this record that fact is in-

contestible, that the lots described in these several tax bills were, upon the date the tax bills were issued, and for a year or more thereafter, the private property of individual owners and that such owners were, when the tax bills were issued, in the quiet and undisturbed possession of these lands and that their title, ownership and proprietary rights therein were at that time fully protected and secured by the provisions of the Missouri Constitution to the effect that private property shall not be taken or damaged for public use without just compensation; *"and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested"* (Mo. Const. Art. 2 Sec. 21).

This constitutional provision has been construed by the Supreme Court of Missouri to mean just what it says, noteably in *Kansas City* v. *Ward*, 134 Mo. 172, 183, where in an opinion by Brace, P. J., it is said:

"The constitution leaves neither to the legislature of the state, nor to any municipality, nor to the courts, the power to say when compensation for private property taken for public use shall be paid. *It must be paid before the property is taken* (the italics are the court's) and the preliminary proceedings, by which the amount to be paid is ascertained in the manner required by law, amount to nothing unless they culminate in actual payment, and *until they do so culminate the owner's rights remain unimpaired.*"

The foregoing language is quoted with approval in *Buchanan* v. *Kansas City*, 208 Mo. 674, at page 682, in an opinion by Gantt, J., who, on the same page, in discussing the provision of the charter of Kansas City now under consideration, declares that:

"Under the charter (of Kansas City) and the Constitution of this state the title to the plaintiffs' tract No. 93 still remained in them *until the payment of the award for the condemnation thereof* in the Spring Valley Park condemnation proceeding."

Similar constitutional and legislative provisions have been held to mean that the title and ownership of the municipality condemning land does not begin until compensation has been paid or tendered.

Cook v. *Park Commissioners*, 61 Ill. 115.
Burt v. *Ins. Co.*, 115 Mass. 1.
Driver v. *Western Ry. Co.*, 32 Wis. 569.
Bensley v. *Water Co.*, 13 Cal. 306.
Mills on Eminent Domain (2 Ed.), Sec. 174.

II.

These tax bills were well issued; they were what Walsh was entitled to under his contract with Kansas City and were, therefore, such property as is protected from the aggression of the State by the Federal Constitution.

The Board of Public Works could not escape assessing the lots in question by the issuance of these special tax bills for their relative share of the cost of the sewer, nor could Walsh, the contractor, decline to accept these bills as part payment of his contract price when issued. The charter of Kansas City expressly and specifically required and directed that such lots should be so assessed, and made no provision for charging other lands or other funds with those sums required to be levied upon these lots.

Article 9, Section 10 of the Charter provides:

"As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax *against the lots of land in the district*, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax against each lot in the district," etc.

The truth upon this record is that the lands described in the tax bills in evidence were "lots of land in the district" not included in streets, avenues, alleys and public highways at the time the tax bills were issued, and at the time Walsh was required to accept his contract price. Indeed, there is no dispute on this record but that Kansas City did issue these special tax bills, nor that they were *special tax bills* when issued as that phrase is technically used in the charter, for the answer of the City in this case expressly recites that defendant City "did issue to Michael Walsh *special tax bill* No. 84 on Lot 1, Black 1, C. H. Pratt's Vine Street Addition and *the other special tax bills* mentioned in the petition herein" (Transcript of Record p. 9).

Walsh, therefore, got what he was entitled to under his contract when he accepted and receipted for the tax bills in question as full payment of his contract price. Kansas City likewise at the same time got what it was entitled to, viz., a discharge from

Walsh from its obligation to pay him the contract price of $71,521.32 in *special tax bills*. These evidenced assessment liens against certain definitely described tracts of land. They were things of value. They were property. And when they were thereupon sold and assigned to the plaintiff in error, they became its property. They were by every token at that time as good as so much gold. But when Kansas City subsequently took possession of those assessed lots and others and made a parkway of them, and opened them to public use so that the charter lien of these tax bills could not be enforced by judicial sale under special execution, these once-while *tax bills* became, if the conclusion of the Supreme Court of Missouri is right, as the ashes of apples—they are worth no more than the paper they are written on; and Kansas City, justified by the State Court, is flaunting in the face of the present holder of these bills in answer to its request to do justice, this answer, "True I issued those tax bills to evidence liens on certain lands and with them paid my debt to you and you gave me a receipt in full, but now I myself have those lands and the public enjoys them for pleasure; good policy will not permit the foreclosure of those liens and the State Court says I go acquit."

The Federal Constitution, we submit, says otherwise.

III.

Kansas City is estopped to deny that the lands charged by these special tax bills were private lands when the bills were issued, and to justify it in saying otherwise is to sanction a fraud.

Kansas City is estopped to deny the recitals of fact contained in these special tax bills, and is therefore estopped from denying that the lands recited as assessed and charged thereby were private lands belonging to individuals and legally assessable at the time the tax bills were issued and delivered, as they were, in consideration of a receipt in full for an undisputed contractual debt of the city. And if it be true that the tax bills were good when issued and so acquired by the plaintiff in error, it goes without saying that Kansas City is without power to destroy them or their value without making good the loss.

It is the thoroughly established rule of law and morals that a munipicality is estopped from denying the recitals of fact contained

in securities issued by such municipality, where such recitals are made by the municipal officers whose duty it is to ascertain and determine such facts.

Oregon v. *Jennings*, 119 U. S. 74.
Bissell v. *City of Jeffersonville*, 24 How. 287.
Coloma v. *Eaves*, 92 U. S. 484.
Hackett v. *Ottawa*, 99 U. S. 86.
Hitchcock v. *Galveston*, 96 U. S. 341.
Argenti v. *San Francisco*, 16 Cal. 255.

In the case of *Oregon* v. *Jennings*, *supra*, the court say:

"Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the 'corporate authorities' to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bond, the Town is estopped from asserting as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with. They state, in each bond, that the faith, credit, and property of the Town are, by the bond, solemnly pledged for the payment of the principal and interest named in it 'under authority of' the Act of March 30, 1869, reciting its title, and that the 60 bonds, amounting to $50,000, 'are the only bonds issued by said Town of Oregon under and by virtue of said Act.' The provision in section 6 of the act, that the Town shall, by its proper corporate authority, annually assess and levy a tax to pay the interest and principal of the bonds, is a warrant for the pledge made in the bonds, of the faith, credit and property of the Town. The recitals are within the adjudged cases in this court, as to the effect of recitals in bonds, that they are issued 'under authority of' a specified statute; and 'under and by virtue of' that statute; and 'they estop the Town from taking the defense that the first division of the road was not completed by the time specified, as against the plaintiff,' as a *bona fide* holder of the bonds."

In *Hackett* v. *Ottawa*, *supra*, the court say:

"For all corporate purposes, as we have seen, the Council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was

relieved from any responsibility or duty in that regard by reason of the representation upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for *municipal* purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially a declaration by the city, with the consent of a majority of its legal holders, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is, therefore, estopped, by its own representations, to say, as against a *bona fide* holder of the bonds that they were not issued or used for municipal or corporate purposes. * * * It would be the grossest injustice and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money centers of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Justice Campbell, in *Zabriskie* v. *R. R. Co.*, 23 How. 381, as to a private corporation, and repeated through Mr. Justice Clifford in *Bissell* v. *Jeffersonville*, 24 How. 287, as to a municipal corporation, may be reiterated as peculiarly applicable to this case: 'A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.' "

IV.

Kansas City through its proper officers construed its charter to the effect that the lands in question were chargeable under its terms as private lands, and that construction should control the courts; and under that construction the tax bills in question when issued and acquired by the plaintiff in error evidenced valid liens and were property.

That construction of the charter which was made by the executive officers of Kansas City and especially by the Board of Public Works with whom the charter lodges the power and duty to determine those matters should control in this case.

By issuing the tax bills here in question and reciting on their face that they were duly issued and were liens against the lands described therein, Kansas City, through its duly authorized officers, has construed the Kansas City Charter to the effect that such lots were then duly chargeable as private property and that they were not then *used* as streets or highways of the city so as to be exempt from assessment.

Von Hostrup v. *City of Madison*, 1 Wall. 291.
Myer v. *City of Muscatine*, 1 Wall. 384.
Port Huron v. *McCall*, 46 Mich. 565.
Pennoyer v. *McConnaughy*, 140 U. S. 1.

In *Von Hostrup* v. *City of Madison*, *supra*, the court say:

"Our conclusion, upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it."

In *Port Huron* v. *McCall*, *supra*, Cooley, J., for the court, said:

"If the true construction of the law is in doubt, the city ought to be held to the view its own authorities took of it when borrowing money under it, especially as nothing was involved in the original action but the mere change in the form of a city debt. There is a principle of law that municipal powers are to be strictly interpreted; and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted. But when a power is conferred which in its exercise concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the state is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs."

In commenting upon the above decision of Judge Cooley, Mr. Dillon, in a note to Section 241 of his work on Municipal Corporations (5 Ed.) says:

"The author ventures to express the opinion that in the case and within the limitations stated by Judge Cooley the principle

that the courts will follow the practical construction adopted by the municipality ought to be applied more freely than seems to have been the case, when such a course is necessary to prevent injustice to third persons."

In *Pennoyer* v. *McConnaughy, supra*, the court say:

"The principle that the contemporaneous construction of a statute by the executive officers of the government whose duty it is to execute it, is entitled to great respect and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it."

If these special tax bills were well issued by Kansas City, that is, were issued in compliance with its charter powers and were, conformable to the same powers, applied by it to discharge its contractual obligation, it owed the duty to the holder to do or permit nothing thereafter to be done, which would destroy the value of the bills, unless it stood ready to recompense for its act in so doing. It did, however, act affirmatively and now claims that by that act it has destroyed plaintiff's remedy and yet should not pay the loss.

V.

The Supreme Court of Missouri resorted to a fiction for the basis of their conclusion that the assessed lands were the city's property when the tax bills were issued when in fact they were not. Fictions wilt in the presence of the Federal Constitution when to apply them would destroy property rights.

The Supreme Court of Missouri resorts to a fiction in reaching the conclusion that these municipal securities, which the City delivered to Walsh, and which were used by the City at their full face value in discharging its contractual obligation to Walsh, and which were thereupon purchased and paid for by the plaintiff in error, were not special tax bills when issued and were not such special tax bills solely because Kansas City by continuing to prosecute a condemnation proceeding relative to the lots charged thereby after it had issued these special tax bills by causing its judgment thereon to be affirmed, would by a fiction be construed to have been the owner of the lots in question at the time the bills

in question were issued when in fact it was not, and that the said lots would be construed as being at the date of the issue of the bills *used* as a street or highway when in fact they were not.

"The law is fairly well settled that the title of the city to these lots for use as a street attached by relation back under the facts here to the date of the judgment confirming the verdict of the jury, to-wit, September 14, 1901, a date long prior to the issuing of the tax bills, which were issued March 15, 1902" (Opinion of State Supreme Court, Transcript of Record, p. 49).

Now it is an undisputed fact on this record that on the date of the issuance of the tax bills, March 15, 1902, the lots in question were in the quiet and undisturbed possession of individuals as owners and no part of the condemnation award had then been paid or tendered to them. The judgment determining the amount of these awards was at that time in abeyance by reason of the appeal of the condemnation case to the Supreme Court of the state, and not until September 5, 1903, was it determined that the award in the condemnation proceeding had been paid, and that the title of the owners of these lots was transferred to and vested in Kansas City (Transcript of Record p. 24).

This court cannot accept the dictum of the Supreme Court of Missouri as to when Kansas City acquired the title and ownership of these lots as against the plain fact that Kansas City at that time, to-wit, March 15, 1902, had not acquired the title or ownership of these lands, when that conclusion would have the effect of negativing Kansas City's express declaration to the contrary and of depriving the plaintiff in error of its property acquired on the faith of that declaration without just compensation. That method of taking one's property away from him is a fraud. It is downright dishonesty. That dictum of the Supreme Court of Missouri not only flies directly in the face of the Constitution of the State as to when ownership passes in condemnation proceedings, but it has the effect, by assuming that to be true which is not true, of making it possible for Kansas City to perpetrate, to use the phrase of the State Supreme Court, a "palpable dishonesty."

The Supreme Court of Missouri continuing the opinion in the case at bar, after the quotation just made from it, proceeds to recite as follows:

"The best that can be said for plaintiff's insistence touching this lien is that the lien of the tax bills attached conditionally to

these lots; the condition of attachment being that the defendant would dismiss its condemnation case short of the final judgment and payment of the money into court, as under the general law, absent a charter provision forbidding, it had the right to do. The city did not so dismiss the proceeding and the right of the city temporarily suspended as we may express it, by the appeal, attached upon the affirmance here of the judgment of condemnation as of the date of such judgment, and had the effect to convert these lots of private persons into integral parts of the highway or street system of Kansas City, and to take them out of the category of property of private persons upon which the liens of tax bills would attach" (Transcript of Record p. 49).

This argument is specious, but is not sound. The contractor, Walsh, under his contract with Kansas City, was entitled to have the full amount of his contract price assessed against the lots and tracts of private land in the sewer district. Kansas City asserted that it was giving him such when it gave him the special tax bills in question and took his receipt discharging it of its contractual obligation in consideration of that delivery. Plaintiff in error purchased and took the tax bills which the city had given to Walsh, with all of Walsh's rights therein, and it took them relying upon, and justifiably relying upon, the plain recitals on their face. According to the argument of the Supreme Court of Missouri, Kansas City is now heard to say that the lots described in those tax bills were not on March 15, 1902, private lots belonging to individuals, but were the city's lands and part of its streets and highways. That in fact is not true. Upon this record it is not true. At best it is a mere argumentative or judicial fiction. But Kansas City cannot take that position in a court of justice while it holds the fruit of its representation, because it is in conflict with its previous express declaration, and it would be dishonest for Kansas City to now falsify what it then said was true. And for a state through any of its instrumentalities to take property dishonestly, or to take property without giving lawful compensation although it may be taken according to the written laws of the state, is to take property in a way that the Federal Constitution declares to be without right, and for such a taking the injured party has his remedy.

VI.

The tax bills in question, being property when issued and acquired by the plaintiff in error, continue to be property within the protection of the Federal Constitution, and must be compensated for by Kansas City now that it has by its acts rendered them unenforcible through charter methods.

These tax bills by the admissions of defendant's answer and in truth were tax bills when issued on March 15, 1902, for the lands described in them and assessed by them were private lands on that date and were not used as streets or highways of Kansas City, and the plaintiff in error became the owner of those tax bills when issued. If the City had taken no further affirmative steps or acts thereafter not even a sophist could have argued to the contrary. It is only because the City did prosecute its appeal after issuing these tax bills and did thereby cause its condemnation verdict to be affirmed and took possession of the lots thereafter and improved them as a part of a parkway that the State Supreme Court is led by resorting to a fiction to conclude that what was not so, was so. Why, then, are they not tax bills now and why are they not enforcible as such?

Since these tax bills were issued and acquired by the plaintiff in error, Kansas City has taken actual possession of these lots for public use as a parkway and improved them with other lands as such and they have become a part of an extensive and beautiful pleasure ground a mile and a half long with a maximum width of six hundred feet, and the public policy of Missouri is such as to forbid the sale of such public properties for the purpose of enforcing the liens of special assessments.

In *Clinton ex rel Thornton* v. *Henry County*, 115 Mo. 557, 568, a suit to enforce a tax bill against the court house square, opinion by Black, P. J., it is said after a mature consideration of the subject in hand and a review of the authorities of other states:

"Property owned by a county or other municipal corporation and used for public purposes cannot be sold on execution. It is against public policy to permit such property to be sold; for the effect of a sale would be the destruction of the means provided by law for carrying on the government. 2 Dillon on Municipal Corporations, 4 Ed. Secs. 576, 577; Freeman on Executions, 2 Ed. Sec. 126. And Section 2344, Revised Statutes of 1879, is declaratory of the same principle."

There is no need to go further than the opinion of the State Supreme Court in the case at bar for this rule of state policy for it is there said that the condemnation proceeding "had the effect to convert these lots of private persons into integral parts of the highway, or street system of Kansas City, and to take them out of the category of property of private persons upon which the liens of tax bills would attach" (Transcript of Record, p. 49).

In *Bogni* v. *Perotti*, (Mass.) 112 N. E. 853, 855 (not yet officially reported), opinion by Rugg, C. J., it is said:

"'Lawful property cannot be confiscated' under the guise of a statute. *Durgin* v. *Minot*, 203 Mass. 26-28. When legislative attempts to compel the deprivation of certain comparatively small sums of money without due process of law invariably fail (see, for example, *Northern Pacific Ry.* v. *No. Dakota*, 236 U. S. 585; *Great Northern Ry.* v. *Minnesota*, 238 U. S. 340; *Chicago, Milwaukee & St. Paul Ry.* v. *Wisconsin*, 238 U. S. 491; *Louisville & Nashville Rd.* v. *Central Stockyards Co.*, 212 U. S. 132), it is manifest that something recognized as property by the law of the land cannot be extinguished utterly."

VII.

The tax bills were not collectible from the condemnation awards to the fee owners of the charged lands.

Plaintiff in error's interest in the lands covered by the special tax bills or the sum of money it was entitled to collect by virtue of them was not included in the verdict in the condemnation case, because (1) this sewer improvement was put upon these lands at the instance of Kansas City *after* the condemnation trial and verdict was had and rendered; (2) neither plaintiff in error, nor its assignor, the contractor, was a party to the condemnation suit; (3) the trial court upon sufficient evidence expressly found that plaintiff in error was not entitled to collect the amount of these bills from the condemnation award; (4) the city, as shown by this record, has paid this condemnation award to other parties as the true owners thereof.

In re Pasco, 78 Mo. App. 518.
Holmes v. *Kansas City*, 209 Mo. 513.

The defendant city therefore should respond to this claim.

VIII.

The receipt given by the contractor to the city for his full contract price is no defense to this action.

It is absurd to assert under this record that plaintiff in error cannot maintain suit because the contractor, to whom the tax bills were issued by the city in good faith, receipted therefor in good faith as full settlement of the contract price, or because the city, with the power and duty so to do, did not issue proper tax bills.

Barber Asphalt Paving Co. v. *City of Denver*, 72 Fed. 336.
Barber Asphalt Paving Co. v. *City of Harrisburg*, 64 Fed. 283.
Ft. Dodge Electric Light & P. Co. v. *City of Ft. Dodge*, 115 Ia. 568.
Iowa Pipe & Tile Co. v. *Callahan*, 125 Ia. 358.
Oster v. *City of Jefferson*, 57 Mo. App. 485.
Fisher v. *City of St. Louis*, 44 Mo. 482.
Barber A. P. Co. v. *Chicago*, 139 Ill. App. 121.

In *Ft. Dodge Electric Light & Power Co.* v. *City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7, it is held that where a municipal paving contract stipulated that the contractor should receive the special assessment certificates in full payment, and such assessment was illegally and without authority levied on the property of a street railway not liable therefor, the city was liable to the contractor for the amount of the void certificate, since had the entire amount been assessed against abutting property it would have been valid, and it therefore lay within the power of the city to fulfill its agreement by making a valid assessment.

It was a suit by the plaintiff as owner of a street railway in the defendant city to enjoin the collection of a special assessment for paving a street on which the car line was located. The Iowa National Bank intervened, claiming to be the owner by assignment from the contractor of certificates issued for the assessment against the street car line, and asked to have such certificates enforced against the plaintiff or the defendant city, and the city was held liable upon the claim. The court, speaking through McClain, J., in so ruling, say:

"In the contract for the paving it was stipulated that the contractor should receive the special assessment certificates in full payment, excepting insofar as the city obligated itself to pay the cost of paving in front of the city square and at street and alley intersections. But intervener contends that the city is liable

for the amount represented by certificates issued against the assessments of the plaintiff, which, as we have seen, are invalid. If the city had no authority to assess any portion of the cost of this improvement to plaintiff, then the entire amount which was assessed to plaintiff might have been included in the assessment to abutting property owners, and certificates representing such assessments would have been valid. Therefore, by the erroneous action of the city in making the assessments, intervener, as holder of the assessment certificates—not only those representing the assessments against the plaintiff, but also those representing assessments against abutting property owners—has been damaged to the amount of the void certificate. This is not a case where the city undertook to do something which it could not do, and which the party contracting with it was bound, as matter of law, to know it could not do. Here the city could have done what it agreed to do (that is, have made a valid assessment on abutting property for the entire cost of the improvement not directly assumed by the city), and it failed to do so. The party contracting with the city had no control over the method of determining the part of the cost which should be assessed to each property owner, nor over the method of issuing certificates. If by the wrongful action of the city he is unable to realize on any of the certificates issued to him, by reason of the wrongful action of the city council in carrying out the contract between him and the city, then we think he has a right to recover from the city. It has been frequently decided that where a city issues obligations payable out of a special fund, which it has authority to raise, but failed to take the steps necessary to bring such fund into existence, the holder of the obligations may recover against the city. In *Reilly* v. *City of Albany*, 112 N. Y. 30, 42, 19 N. E. 508, 510, the following language is used, which seems pertinent in the case we have before us: 'When the contractor has performed his work according to his contract, he had no duty remaining to discharge, and then he had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have ben supposed that he was not only to earn his compensation, but also to set in motion and keep in operation several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty.' And see, as supporting the same proposition, *Barber Asphalt Paving Co.* v. *City of Denver*, 19 C. C. A. 139, 72 Fed. 336; *Denny* v. *City of Spokane*, 25 C. C. A. 164, 79 Fed. 719; *Winston* v. *City of Spokane*, 12 Wash. 524, 41 Pac. 888;

Barber Asphalt Paving Co. v. *City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283, 29 L. R. A. 401; *Heller* v. *City of Garden City*, 58 Kan. 263, 48 Pac. 841; *Lyon* v. *District of Columbia*, 20 D. C. 484; *Hitchcock* v. *City of Galveston*, 96 U. S. 341, 24 L. Ed. 659. * * * Something should be said as to the argument that the contractor, by accepting the certificates, waived any claim against the city. The question whether the council could lawfully assess a portion of the costs upon plaintiff depended not simply on the laws of the state, but upon the terms of the contract between the city and the plaintiff. It would not be reasonable to hold that the contractor must know, at his peril, whether the certificates based on the assessment against plaintiff were valid. He was justified, we think, in assuming that the city had made a valid assessment and issued enforcible certificates; and, if the certificates issued were not valid, then he was entitled to his recourse against the city. *Chicago* v. *People*, 56 Ill. 327."

As against the claim that the impediment in the enforcement of the tax bill lien was the affirmative act of Kansas City, occurring after the tax bills were issued, in causing its condemnation verdict and judgment to be affirmed and taking possession of the lands covered by the tax bills and changing those lands from the private property of private owners to public lands owned by the municipality, it will not do for Kansas City to plead in avoidance that the contract by virtue of which the tax bills were issued or the charter of the city required that the owner of the tax bills should assume all the hazards incident to the enforcement of the tax bills and of their validity. The terms of that contract and of the charter contemplated that Kansas City would in good faith and to the full extent of its corporate powers exercise every authority at its command to issue and preserve inviolate good and lawful special tax bills evidencing valid liens against the taxable lands. Certainly the rules of law and morals forbid Kansas City from committing affirmative acts the effect of which would be to cause these securities which it had issued to be or become worthless.

With this obligation upon it, no court can contemplate otherwise than with aversion the claim of Kansas City that it, by its own affirmative act, can render these tax bills invalid and so deprive the plaintiff of its property and be excused from making good the loss so occasioned to the plaintiff on the ground that the holder, when he took the tax bills assumed the risk of their validity. Such a rule of conduct falls far short of meeting up to the standard of legality uniformly recognized in courts of justice. One cannot

give something to pay a debt and then voluntarily take that something away or destroy it and thereafter be heard with patience to claim he has escaped legal liability.

In *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, it is held, as declared in the syllabus of the opinion, as follows:

"The prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. The contention that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defense. The judicial authorities of a state may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with that amendment."

Conclusion.

Our case is this: We got such special tax bills as the charter contemplated should be issued in payment of a contractual debt of the city. The tax bills and Kansas City through its officers expressly represented that they were valid liens upon the property described in them and so induced the contractor and the plaintiff in error to accept them. Kansas City received full value for them. After they were issued Kansas City proceeded to do things in reference to these lots, which under the laws of Missouri exempted them from sale under special execution to pay such special assessments as the charter contemplated should be done. Kansas City now owns and occupies these lots as public property. If the judgment of the Supreme Court of Missouri is right we have been deprived of our property by Kansas City without compensation, which is the same thing as being deprived of property without due process of law; and the city should pay to us the value of the thing it has taken from us. The trial court so adjudged and that judgment was right and should be reinstated. The judgment of the Supreme Court of the State was not concurred in by Chief Justice Woodson nor by Judge Graves. We submit the judgment of the State Supreme Court should be reversed and that of the Circuit Court of Jackson County should be affirmed.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916

MUNICIPAL SECURITIES CORPORATION,
Plaintiff in Error.

v.

KANSAS CITY,
Defendant in Error.

No. 736.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.
FILE NO. 25019.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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IV. A recovery cannot be had on the theory that the tax bills as issued constitute in effect the certificates required by law. To permit it would be to ignore the distinction made by the plain provisions of the law, which otherwise is useless verbiage with, no purpose or meaning. The distinction is material..... 26

Charter, Art. IX, Sec. 18.

AUTHORITIES.

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STATEMENT.

Under authority and power of its Charter Kansas City condemned certain land for public uses for a parkway. From the verdict and judgment awarding damages and benefits certain parties appealed to the Supreme Court, whereby the judgment stood "suspended" under the provisions the Kansas City Charter, Art. X, Sec. 18.

Prior to the verdict, a contract was let to plaintiff's assignor, to construct a sewer in the Sewer District which included said land, to be paid for by tax-bills against the property therein, exclusive of public highways, except that the cost chargeable against public property, other than highways, should be ascertained and certified without tax-bills.

The chronology of the case was as follows:

Ordinance 13067, To condemn Paseo, approved Oct. 3, 1899.

Ordinance 16219, To establish District sewer, approved Jan. 24, 1901.

Contract—With M. Walsh, Feb. 28, 1901.

Verdict—In Paseo Case, Filed June 8, 1901.

Judgment—In Paseo Case, entered Sept. 14, 1901.

Taxbills Issued, March 15, 1902.

(Lien of tax-bills expired in 2 yrs. (Art. 9, Sec. 18) Mar. 15, 1904.)

Condemnation Judgment affirmed in Supreme Court, June 4, 1902.

Mandate filed—June 23, 1902.

Suit filed against city, May 29, 1906.

Amended petition filed, May 20, 1909.

Judgment against city, Jan. 22, 1910.

Reversed by Missouri Supreme Court, Div. 2, Feb. 23, 1915.

Reversed by Missouri Supreme Court In Banc, June 1, 1915.

Writ of Error to U. S. Supreme Court, Nov. 13, 1915.

After the judgment in the condemnation case was affirmed by the Missouri Supreme Court, the City proceeded to act upon that judgment and in due time took possession.

The tax bills referred to in this case were expressed to be against a part of the land condemned.

1. Plaintiff did not seek to have the amount of the tax-bills paid to it out of the fund awarded for the land taken.

2. Plaintiff did not make any effort to enforce the claimed lien of the tax-bills against the land.

3. Plaintiff made no effort to compel the city officers to issue new bills if the old bills were improperly issued.

4. Plaintiff made no effort to compel the city officers to properly ascertain and certify the city's liability in the manner provided by the charter, if any such liability existed.

5. Finally, claiming that its rights had in some way been violated by the city, it brought the present action, praying (and receiving) a general judgment.

The city contends that if the tax bills were valid, plaintiff failed to take the proper steps to protect and enforce its rights thereunder; that if not valid, the conditions essential to create and establish a liability in contract were absent; and that there could be no liability to plaintiff in tort, because the city took no unlawful act and because the plaintiff's rights, if any, are as assignee of the tax bills only.

That therefore the decision of the Missouri Supreme Court was without error.

* * *

References in this brief to the "Charter" of Kansas City, are to the Charter of 1889, as amended and published in the edition of 1898, in force up to 1909, and including the time of the occurrences involved in the present suit.

References to "Plaintiff's Brief" are to the "Statement, Assignments of Error and Brief for Plaintiff in Error."

BRIEF.

I.

There is no Federal question in the case.

The assignments of error assume that their rights under the taxbills in question were taken from them in violation of the 14th Amendment.

There is no allegation in the petition upon which to hang a claim of violation of any Federal right.

The nearest approach to it comes in two widely separated allegations, viz:

> "Said Kansas City paid for and took possession under said condemnation proceedings of Lot 1, Block 1, C. H. Pratt's Vine Street Addition as a public park, and now holds the same as such" (Transcript, middle of p. 7).

> "Kansas City cannot by an act of itself not consented to by plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy the plaintiff's right to collect the cost of the said work according to its said contract" (Transcript, p. 8).

The first of the foregoing allegations constitutes no basis for an action; for if true, that Kansas City took and "paid for" the lot, no allegation of wrong doing is present. And the second allegation quoted is a mere abstract statement of a rule or principle of law, the correctness of which (unless it be construed as denying the city's right of eminent domain) might be conceded without affecting the issues in the case. It is mere surplusage.

There is no allegation, and no evidence, that plaintiff ever sought to enforce its lawful remedy on the taxbills by foreclosure of the lien thereof, if it existed, or that Kansas City ever prevented it from seeking such remedy. Defendant made timely objection on this ground, to the introduction of any evidence under the petition (Transcript of Record, p. 11).

And even if the petition contained a sufficient direct allegation, the context and the undisputed evidence negative any violation of the constitutional right of "due process of law."

The condemnation proceedings were going on at the time the contract for the work was let, and the verdict and judgment had been entered long before the bills were issued, and were only suspended pending the appeal. Kansas City not only was guiltless of any *unlawful* act by which the plaintiff's assignor's rights were destroyed or by which he was deprived of them; but, on the other hand, the city took *no affirmative action at all*, except to defend against someone's appeal in the pending proceedings. The affirmation of the judgment by the Supreme Court not only was not an unlawful act of the city of which complaint can be made, but, on the contrary, being in continuation and affirmance of proceedings already pending to which the contractor was subject, and by which he was bound, it was *in a superlative degree "due process of law."*

If its lien existed at all against the land, the law, *ipso facto*, transferred that lien to the fund awarded. If it did *not* have a lien on the land, then it was deprived of nothing by the condemnation proceedings, and plaintiff's appeal to the protection of the "due process of law" clause of the Constitution fails.

II.

The claim of right set forth in the petition, and in the argument defending the judgment thereon, is too ambiguous, duplicitous and inconsistent to sustain the judgment.

The facility with which plaintiff's argument changes character, being based in one moment on the alleged indestructibility of the tax bills and their lien on the land without prior compensation; in the next on the claim that they were destroyed by a valid, lawful, judicial proceeding; and finally that they were destroyed without due process of law, renders a reply difficult of arrangement. Their theories of the case are so interwoven in the petition, in the assignment of errors, and in the brief, that it is not easy to follow the thread of the argument. As was aptly said by the learned judge who wrote the opinion in the Missouri Supreme Court, "The suit here is upon a tax bill in some aspects and upon a tort as for conversion in others. The petition is *sui generis*, being possibly what is meant by learned counsel for plaintiff when they say of it in their brief that it is '*typical in form*' " (Transcript of Record, p. 49).

III.

The judgment cannot stand on the taxbills as such, or as representing any acknowledgement of liability by the city, either on the theory that the cost should have been placed:

1. **On the land condemned; or**
2. **On the other, private, property in the district: or**
3. **On the city's general fund.**

At the time the work was completed, there were three possible places where the cost thereof have been put.

1. *On the land being condemned,* on the theory that it was still private property; and upon condemnation, the lien would either—

a. Be deducted from the award; if the condemnation included the lien holder's interest: or

b. Remain on the land, subject to enforcement by special judgment of foreclosure.

2. *On the other, private, property in the district,* under a proper apportionment, on the theory that the land was part of a public highway.

3. *On the city's general fund,* under a proper certification by the Board of Public Works that the city owned the property for purposes other than a highway.

Only under the third of these alternatives would the city be liable to a general judgment such as was rendered.

1. *On the land being condemned.*

If theory No. 1 was correct, then the tax-bills became a valid lien on the land. When the city brought its condemnation proceedings, one of two results followed:

(a) If the proceedings were valid to condemn the land and all interests therein, then the lien was transferred from the land to the fund (*Ross* v. *Gates,* 183 Mo., 338, quoted below,) and collectible out of that fund.

(b) If the proceedings were not valid so as to effect this transfer, then the lien of the tax-bills remained, and no act of the city thereafter could affect that lien.

The Supreme Court of Missouri effectually disposed of both these theories, 1-a and 1-b, when it found that in law the title of the city reverted back to the date of the ordinance (Transcript of Record, p. 49), and the finding of the highest court of a state on the legal effect of its own laws will not be disturbed by this court. And plaintiff expressly repudiates any right to recover on theory 1-a.

when it says in its petition—"Plaintiff alleges that it is advised by counsel and believes, and therefore charges the fact to be, that by reason of the *prior judicial* determination of the value of said property and the judgment of condemnation thereon, in said condemnation proceedings *said tax-bills never became a lien upon the value of said lot awarded to the owner thereof*, in said condemnation proceedings" (Transcript of Record, p. 7-8). And in its brief in this Court, (p. 26, sub-head VII) plaintiff again repudiates any claim on that theory.

(1-a)

But if, as contended by plaintiff in error, the land was at the date of the tax bills private property, in that case the lien of the bills attached to the land at once. This was a lien which could not be evaded, and upon the affirmation of the condemnation judgment by the Supreme Court the lien passed on over to the fund awarded for the land."

In *Ross* v. *Gates*, 183 Mo., 338, it was said:

> "It is contended that the Constitution provides that just compensation shall be paid to the owner, or into court for his benefit, for his land, and as no provision is made in the Constitution or in the city charter for a mere lien-holder, he is not entitled to any part of the compensation, no matter what his right to the land may have been.
>
> "The constitutional guaranty referred to is in no manner impaired by preserving the rights of a lienor in the proceeds of the condemnation in exactly the same degree as they existed in the land. Moreover, as shown herein, the charter of Kansas City affords express protection to the rights of the lienor, and without this the law affords ample protection therefor."

Plaintiff in error states in its petition (*supra*) that it was "advised by counsel" that "said tax-bills never became a lien upon the value of said lot awarded to the owner thereof in said condemnation proceedings."

We submit that if the land was private property when the bills were issued, then counsel are in error on this point. The court in *Ross* v. *Gates* (*supra*) ruled that the lien *would* attach to the fund. Their argument (plaintiff's Brief, pp. 6, 26) that the bills could not attach to the award because they were issued after the award will not stand. *First,* because the contract for the sewer was let February 28, 1901, more than three months prior to the returning of the condemnation verdict, and there is no evidence that the jury did not take this fact into consideration in fixing their award. *Secondly,* whether they did or not, could not affect plaintiff's lien on the fund. The city and the property owner might have to come to an adjustment of their settlement, if the latter was not being paid just compensation for his land. But plaintiff asserted no claim against the award, where (if its theory is correct that the land was privately owned when the bills were issued) its security lay. With the fund intact, and all parties in court, a proper order could have been made. If perchance it involved a further adjustment between the city and the lot owner, plaintiff had nothing to worry about. But if plaintiff failed to assert, in due time, its claim against the fund, the city was not thereby made liable.

(1-b)

And no such judgment as was rendered in this case will stand under (1-b) theory, because on that theory the judgment must be for foreclosure of the lien, and not for a general judgment.

The clauses of the charter of Kansas City and the Constitution of Missouri, and the citations of cases in support thereof, cited by plaintiff in error (Statement,

Assignments of Error and Brief for Plaintiff in Error, pp. 6, 7, 16), if they are relevant, are only so on the theory that the tax-bills were valid liens, and that if not paid for they would continue in existence, in which case the foundation of plaintiff's argument, that its lien was destroyed, crumbles.

For if the city cannot destroy plaintiff's lien, if it is powerless to acquire title without payment, then if it did not pay it never destroyed the lien, and (in the absence of other facts) such lien would continue.

The rule of law laid down in *City of Clinton ex rel. Thornton* v. *Henry County*, 115 Mo. 557, cited by plaintiff in error in its brief (p. 25), applies only to tax-bills issued *after* the land becomes city property. The taking of land subject to a valid lien, without either paying it or transferring it to the award, does not destroy or in any way affect the lien.

State v. *Mo. Pac. Ry. Co.*, 75 Neb., 4, 105 N. W. 983:

This was a suit (instituted after condemnation) for taxes levied prior to the condemnation by the railway company. In holding that the lien was not destroyed by the condemnation the court said:

> "The District Court also held that the taxes assessed before this right of way was acquired by the railway company were a lien upon the lots and upon the right of way of the railway company. * * * The judgment of the District Court is right, and it is therefore affirmed."

But such lien must be enforced by a proper proceeding which will determine its validity as a lien, and in which the judgment, if for plaintiff, will be special, not general.

The mere taking physical possession of the land would not destroy the lien. The Supreme Court of Missouri did not decide, as is stated by plaintiff in error (Plain-

tiff's Brief p. 18), that the taking possession by Kansas City destroyed their lien so that it "could not be enforced by judicial sale under execution" so that the bills became "as the ashes of apples." What is held was that a *general judgment* would not lie. There was no judgment on the tax-bills upon which the Supreme Court could have rendered such a decision if it had desired to do so. The lienholder himself has no right to the possession until after foreclosure.

The petition will not sustain such a judgment as was rendered, for aside from its informality as one on a tax-bill, its prayer is not for the enforcement of the lien of the bill; and the judgment rendered thereon (Transcript of Record, pp. 28-29) was a general one in "damages" and not one enforcing the lien.

> "In a suit on any special tax-bill the judgment shall be special that the plaintiff shall recover the amount found due, including interest, together with costs, to be levied and made off the land described in the tax-bill, and a special execution shall issue to sell the land to pay any judgment, interest and cost."
>
> Charter of Kansas City, Sec. 18, Art. IX.

A suit to foreclose would bring in the fee holder and give him his day in court, and would definitely determine the question of the validity of the lien; whereas, an action for a general judgment raises an entirely different issue, and the judgment thereon is payable from an entirely different source.

It was well said by plaintiff in error in reference to this point, on page 15 of its brief in this court,—"The charter of Kansas City provides *only one method of enforcing such special taxbill liens, viz., by a suit in which the judgment shall be special* that the plaintiff shall recover the amount found due, including interest, together with costs, to be levied and made off the land described in

the tax-bill, and a special execution shall be issued to sell the land to pay any such judgment, interest and costs." (Sec. 18, Art. IX, Kansas City Charter, quoted above.)

It is now too late to recover on the tax bills, because of the plaintiff's *laches*, but that will not justify a general judgment.

If the alleged lien was valid, and remained so, and was not transferred to the fund, then it is only by its failure to act within the period of limitation allowed by law and not because of any tortious or unlawful or unconstitutional act of the city that respondent lot its security. The bills, by their terms and by the charter, were a lien for a definite period within which suit must be brought. But it is also provided, both by the terms of the bills and by the charter, that plaintiff in such suit must within thirty (30) days after such period, file with the City Treasurer a statement or notice thereof.

> "Every special tax-bill issued under the provisions of this article shall be a lien upon the land described therein, upon the date of the receipt to the Board of Public Works therefor, and such lien shall continue for two years thereafter, but no longer, except as in this article otherwise provided, unless suit shall be brought to collect the same within two years from the issue thereof, in which case the lien shall continue until the determination of the legal proceedings to collect the same, including any sale of the property charged; *provided*, however, that if such suit shall be brought within the two years, the plaintiff or plaintiffs therein shall at the time, or within ten days after the commencement of suit, and not later than thirty days after the end of the two years, in person or by attorney or agent, file in the office of the City Treasurer, a written statement showing the tax-bills sued on, and when and in what court, and against whom the said suit has been brought. The City Treasurer shall, immediately after the filing of any such statement, note on the record of such tax-

bill the time of filing of such statement and the substances of the same. If the plaintiff or plaintiffs in such suit shall fail to file such statement within the time above limited, the land described in the taxbill sued on shall be free from the lien of the taxbill and of any judgment in such suit, no matter when rendered, and shall not be sold in satisfaction of any such judgment."

Charter of Kansas City, Sec. 18, Art. IX.

And when, as here, tax-bills are made payable in installments, it is provided:

"The lien of all tax bills issued under this section shall continue for a period of one year after the last installments specified therein shall have become due and payable and no longer, unless within such year suit shall have been instituted to collect such tax bill and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of such tax bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same."

(Charter of Kansas City, Art. IX, Sec. 23).

And the tax-bill recited that it had—

"* * * a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and not longer, unless within such year suit shall have been instituted to collect this tax bill, and notice of the bringing of such suit shall have been filed with the City Treasurer, in which case the lien of this tax bill shall continue until the termination of such suit." (From the taxbill, Transcript of Record, p. 17.)

To comply with the foregoing requirements as to notice respondent has wholly failed, even if we assume that the action was properly brought.

Defendant in error does not dispute the correctness of the abstract proposition of law that private property cannot be taken without compensation; but in a case like this, where the *res* is an intangible thing, a creature of the law, which exists or ceases to exist by virtue and operation of law only, irrespective of the possession or uses of the land, it does deny the soundness of an argument to sustain a general judgment which reduced to its simplest terms, is this:

First: Under a rule of law you are powerless to take, destroy or affect our lien, to enforce which we were, and are still, entitled to a special judgment.

Second: Therefore we ask a general judgment for your having taken and destroyed our lien.

2. *On the other, private, property in the district.*

If this theory No. 2 was correct, that the land was city property, for use as a public highway, then by the terms of the Charter, it was not liable to assessment.

The Charter of Kansas City then in force, Section 10, Article IX, reads:

> "As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the Board of Public Works shall compute the whole cost thereof and apportion and charge the same as a special tax against the lots of land in the district, *exclusive of the improvements,* and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways."

That the Supreme Court of Missouri was right in finding that The Paseo (to establish which the land in question was taken) was and is a "parkway" or "boul-

evard," *i. e.*, a highway, and so not subject to assessment, rather than a "park," is clear from reason and authority.

The distinction between "parks" and "parkways" is fundamental, although they are akin. The case of *Kleopfert* v. *Minneapolis*, 90 Minn., 158, 95 N. W. 908, well defines the two:

> "The charter of the city does not define either parks or parkways; hence the words are to be construed according to their common and approved usage. So construed, a park is not a public street, but a parkway is. A municipal park is a tract of land set apart and maintained for public use, and laid out, planted and ornamented in such a way as to afford pleasure to the eye, as well as opportunity for open-air recreation. A municipal parkway is a street of special width, which is given a park-like appearance by planting its sides or center, or both, with grass, shade trees and flowers. It is intended for recreation and for street purposes. In short, a parkway is essentially a boulevard, giving to the term its modern meaning. Century Dictionary."

A park is fundamentally a resort where people go and remain for their recreation and enjoyment. It is an objective in itself, and has no necessary relation to any other place. Like a city hall square, or jail yard, or a school yard, it may be taxed for special improvements; e. g., the improvement of a street upon which it abuts may be charged against it (if so permitted by general law or charter).

A parkway, on the other hand, is not an end in itself, but is primarily merely a means of transit from one place to another. Its ornamental features are purely incidental. Unlike a park, it may be graded and paved at the expense of the abutting owners, who have vested rights as such in its maintenance as a highway. But because it is a parkway, and ornamented as such, could it be claimed

that it is liable to assessment for the improvement of an ordinary street which intersects it? As above quoted, "a parkway is essentially a boulevard," and that is the common understanding of the term. The Supreme Court of Missouri has recently had occasion to discuss the term "boulevard" (*St. Louis* v. *Handlon*, 242 Mo., 88), and cites with approval sundry definitions thereof, all recognizing its primary characteristics as being a street with possible irregularities of width, direction and ornamentation.

We cannot concede the correctness of respondent's attempt to except the properties involved in the present case from the general rule. The parkway which includes the lots in question has an average width of 175 feet (Transcript of Record, p. 22).

They now form a level part of the boulevard. When they were improved as such and the extent of treatment required to make them such are not shown by the record, nor is it a material question. If they were owned by the City at all, it was as a part of a public street.

In *Birler* v. *Hagan*, 42 Mo., 367, the City of St. Louis had set apart eight feet on each side of Broadway for stands as an open market. Certain abutting owners, assessed for the paving of the street, sought to fix the charge on the city as abutting owner. Judge Holmes, speaking for the court, said:

> "This does not make the city, in any proper sense, the occupant of property fronting on the street. At most it could only be considered an interference with the ordinary use of the public street."

The test is not the amount of travel which may go upon a road in determining whether or not it is a public road.

"A private road might have the large amount. It is the right to travel upon it by all the world, and not the exercise of the right which makes it a public highway."

In re Mayor etc., of New York, 135 N. Y. 253, 31 N. E. 1043, l. c. 1044.

1 Elliott on Roads and Streets (3d Ed.) 215.

In the present case, if the city owned it at all, it owned it for public street purposes.

And this court will not disturb the finding of the State Court on the construction of its own laws.

If the 2nd theory, then, is correct, that the cost of the work was properly chargeable on the other private property in the district, then new tax-bills in place of or supplemental to the ones first issued, should have been issued to cover this cost. That the proper city official could have been compelled by *mandamus* to make such issue, if due, is clear.

In the case of *Kiley* v. *City of St. Joseph*, 67 Mo. 491, l. c. 495, the court said:

"The phraseology of the fourth section is general, and its provisions are without exception. It declares that whenever the mayor and council shall order the paving, macadamizing, guttering or curbing of any street, lane, alley or avenue, the cost of the same shall be paid by the owners of the property in the vicinity. The work now sued for comes within the provisions of this section, and the City is not liable therefor, and it is wholly immaterial that neither the ordinance nor the contract specified the manner of payment. That was fixed by the Charter, and the plaintiff was bound to take notice thereof. It was the duty of the city engineer to assess the cost of the work as a special tax against the adjoining property, and if he neglected such duty, he might have been compelled to perform it, or held liable for his delinquency."

If the cost should have been distributed and assessed against the other, private, property, in the district, the fact that the Board of Public Works actually issued bills for too small an amount against these tracts, and issued invalid bills against city property, would not inhibit the recall of those bills and the issuance of proper ones, and the Board could have been compelled by *mandamus* to do this.

> "The remedy here sought, that of cancelling the tax bills upon a district improperly defined, and issuing new ones upon one properly defined, has been fully recognized by this Court. (*State ex rel. Paving Co.*, v. *St. Louis*, 183 Mo. 230)."
>
> *State ex rel.* v. *St. Louis*, 211 Mo. 591, l. c. 604.

> "The issuing of a void bill does not, as we have held, disable the proper ministerial officer of the city from subsequently issuing a correct bill."
>
> *Weber* v. *Schergens*, 28 Mo. App., 587, l. c. 592.

It will not do to say, as plaintiff in error does (Brief p. 24), in reference to the holding that the lands in question were in a public highway, and so not taxable, that "Kansas City cannot take that position in a Court of justice while it holds the fruit of its representation," etc.

On the theory of the law that justifies special tax-bills at all, that of special benefit to the property against which they were issued, (and this is conspicuously true in the case of sewer construction), the city as such did not receive the consideration, but only the limited district, upon which the bills should have been spread if the lots in question were not liable.

> "The logic of the situation manifestly suggests the rule that all of the taxpayers of a city ought not to be taxed for the default of the city to properly levy

a special improvement tax against the property of an infinitesimal part (e. g. a sewer district) of such city." (Transcript of Record, p. 50)

In *Mister* v. *City of Kansas,* 18 Mo. App., 217, l. c. 227-8, the court said:

> "Those who deal with the officers of a corporation must ascertain at their peril, what they will be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act.
>
> * * *
>
> The plaintiff urges that the law implies an undertaking by a corporation to pay for labor and material employed in their service, and of which it has accepted and is enjoying the benefit. But the law implies no undertaking upon the part of a city by reason of a contract made by her officers in violation of law."

We discuss the effect of a failure of the city's officers to perform a ministerial duty, under sub-head 3.

3. *On the general fund.*

Theory No. 3 is that the land was city property, held for uses other than that of a public highway. The Supreme Court of Missouri has made a contrary finding, and its decision on the construction of its own state laws must stand (Transcript of Record, p. 50).

The soundness of this decision on principle we have discussed above—(III-2).

But assuming otherwise, and that the land in question was in fact not a highway, nevertheless the present judgment could not stand as based on that theory.

That public property is not liable for special tax bills

unless expressly made so by law is based on fundamental considerations and sustained by innumerable decisions.

> "The language of the law as to the property subject to assessment is 'on all lots and parcels of ground on either side of such street.' The question is, whether such language includes property held by a county for strictly public purposes. * * *
>
> According to these adjudications, proceedings to enforce special tax bills are in the nature of proceedings in *rem*, and compulsory payment of the judgment can only be by a sale of the assessed property. As public property like that herein questioned cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes * * *.
>
> The property herein questioned is strictly public property, and on well-settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication."
>
> *The City of Clinton ex rel. Thornton* v. *Henry County*, 115 Mo., 557, l. c. 566, 570, 571.

In the present instance the charter expressly reasserts the above common law principle, and only modifiies it to the extent of providing that in certain contingencies the City will assume a liability provided the prescribed procedure is followed. It says:

> "When the City shall own in fee simple absolute any lot or parcel of land, or hold any land not used as a street, avenue, alley or public highway, it shall, out of the general fund, pay its proper share of the cost of any such work to be paid for in special tax bills as though a private owner of such land, but there shall be no tax bill against any land so owned

or held by the city. The Board of Public Works shall ascertain the share for which the City shall be justly liable, and the amount so ascertained shall be certified to by the Board of Public Works."

Charter, Sec. 14, Art. IX.

It is clear that the tax bills as such create and evidence no liability on the part of the city.

The case of *Barber, etc., Co., v. St. Joseph*, 183 Mo. 451, is squarely in point, as holding a suit on a tax bill can only be maintained where the charter expressly permits it.

> "The judgment was rendered in pursuance of the following provisions of Section 5682 of said statute: 'When the city owns in fee simple absolute any lot or parcel of land liable to be charged for work by special tax bill, and in any case of improvement alongside of a public square or other place held for public use other than a street, avenue, alley or highway, the city shall, out of the general revenue of the city, pay its proportionate share of the cost of the work mentioned in Section 5661, a tax bill against the city to be issued, on which the city may be sued in default of payment; but no property held for public use shall be sold, and the judgment shall be the same as ordinary judgments for the recovery of money on contracts.' * * * It is contended that the demurrer to the evidence ought to have been sustained because of the petition counted upon special tax bills which charged the proportionate cost of the improvement upon the lots in question, and in such an action a general judgment cannot be rendered * * *
>
> *But for the aforesaid provision* of Section 5682, this contention could well be maintained on the authority of the cases cited, but it is fully met and answered by that section of the statute.'

The proper procedure, if the land affected were city property other than highways, was for the Board of Public Works to "ascertain" and then "certify" of record the amount of the city's liability,

> "but there shall be no tax bills issued against any land so owned or held by the city." (Charter, Art. IX, Sec. 14.)

The power given by the above quoted section of the charter (Art. IX, Sec. 14) to the Board of Public Works is an extraordinary one. On its own judgment, not subject to review, and without an ordinance of the Common Council expressly on the subject, the Board is empowered to make a finding, upon certification of which a liability is created against the general fund of the City. Whether the City ought, or ought not, to be liable for a proportion of such an improvement is not in question. The fact is that the ascertainment and certification of the extent of such liabiliy is given *carte blanche* to the Board. Such a power must be strictly construed, and the prescribed mode of exercising it strictly followed.

In the *City of Nevada to use of Gilfillan* v. *Eddy*, 123 Mo., 546, l. c., 557, it was said:

> "Now it is settled law that municipal corporations possess, and can only exercise, such powers as are granted in express words, or those necessarily incident to or implied in the powers expressly granted. *St. Louis* v. *Telephone Co.*, 96 Mo., 623. They are creatures of the law, established for special purposes, and their corporate acts must not only be authorized by their charters, but these acts must be done by such officers or agents, and in such manner as the charter directs."

This requirement is no mere technical one. The issuing of tax bills, according to a fixed rule, given a total assessment and a list of the properties in the district to be assessed, calls for mere mathematical accuracy and can in

practice be safely left to the computation of a competent clerk or deputy, when the result is formally adopted by the superior authority.

Heman Construction Co. v. *Loevy*, 179 Mo., 455, l. c. 467;
Jaicks v. *Merrill*, 201 Mo., 91.

But where it is proposed to impose a charge against the general fund of the city, amounting perhaps to thousands of dollars (in the present case, $3,924.42), into which there enter questions as to the City's ownership of certain property, and the nature of that ownership, and whether the charge be a valid one, the taking of proper steps to meet it, and of conducting the affairs of the City so as to keep within its appropriations, all these things made it important that the members of the Board of Public Works act advisedly and deliberately; and their ascertainment and certification of the amount of the City's liability is not a mere formality.

If in the present case the Board refused to make the certificate desired, the presumption is that in the Board's opinion the City was not justly liable. If they were wrong, *mandamus* would lie to compel them to act.

But certainly no life could be thereby injected into a tax bill which had in fact "died a-bornin'."

The bills are not merely voidable. They are forbidden by common law and by the city charter and are absolute nullities so far as they purport to be a charge against the City property.

Therefore, the present action, if based on the tax bills, cannot be sustained.

The impropriety and illegality of permitting a general judgment against the City is such a case as this, even when the proper action is brought for that purpose, is well brought out in the language of the court in two cases cited below.

The first, *City of Pontiac* v. *Talbot Paving Co.*, 94 Fed., 65, l. c. 69, was on the case, for failure to provide a new assessment, after the original assessment was declared void. The court said:

> "The defendant in error entered upon the performance of its contract for the street improvement under the express statutory provision that payment could be made solely out of special assessments against property abutting on the improvement, and that the contractor should 'have no lien or claim upon the city * * * in any event, except from the collection of the special assessments made for the work contracted for.'
>
> In 1 Dill. Mun. Corp. (4th Ed.), Sec. 482, (see 5th Ed.), numerous cases are collated in a note, and the learned author well remarks in the text: 'The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment; for *why should all be taxed* for the failure of the council to do its duty in a case where the contractor has a plain remedy, by *mandamus*, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence.' But examination of the cases there noted as favoring the general recovery, and as well those cited in the brief of counsel in support of this judgment, reveals no instance of such allowance in the face of a statute expressly prohibiting the payment or collection as a public charge in any event, and the extreme view of liability held in the two leading citations (*Reilly* v. *City of Albany*, 112 N. Y., 30, 42, 19 N. E., 508, and *Commercial Nat. Bank* v. *City of Portland*, 24 Ore., 188, 33 Pac., 532), would merely disregard the contract stipulations, and not affect a case so limited by statute. In *People* v. *City of Syracuse*, 144 N. Y., 63, 66, 38 N. E. 1006, the New York Court of Appeals appears to disapprove the doctrine of *Reilly* v. *City of Albany*, *supra* holding that no action is maintainable against the city, even in such case, for the failure to make an assessment, but the 'proper remedy was to compel, by mandamus, the officers of the city having the matter in charge to pro-

ceed with their duties as required by law.'

However the consensus or weight of authority shall ultimately determine the remedy of the contractor for local improvements, where the statute authorized payment by special assessment, but is merely directory in its terms to that end, or where the collection is limited by ordinance or contract to such assessments, and the authorities fail to provide for or to carry out the assessment, we are clearly of opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override *per se* the inhibitions expressed in this statute, and that the contractor must proceed by *mandamus* to enforce his claim. The decisions in support of this view are well considered, and apparently without conflict."

The second case referred to, *City of Alton* v. *Foster*, 207 Ill., 150, 69 N. E., 783, l. c. 787, was *in assumpsit* for the balance due the contractor for the construction of a sewer. The court said:

"The ground of recovery insisted upon is the neglect and refusal of the city council of the appellant city to levy and collect, or make some effort, at least, to do so, a new or supplemental special assessment upon the property benefited, to meet the deficit above mentioned. The question is, then, for the first time directly presented to this court, whether, under an ordinance and contract and the statute, all providing that the city shall not be liable to the contractor for the amount to be raised by special assessment, the city may nevertheless be held liable for such deficit, upon the ground that its officers and agents have neglected or refused to levy such special assessment. * * * But, notwithstanding the plain language of the ordinance, the contract, and the statute that the city shall not be liable for such special assessment in any event, it is sought to read into the contract an exception to the terms and provisions of the ordinance, the statute, and

the contract itself, not there contained, and to declare that there is an event that may arise, and has arisen, namely, the failure and refusal of the city council to proceed to levy the new assessment, by which the appellant city becomes liable. * * * *It would seem to be an injustice to the public or general taxpayers of the city if the municipality and the contractor could by some act, as between themselves, or by the failure of the one or the other to do some act required by the contract or the law, render the general taxpayers, or the general fund of the city, which is derived from the general taxpayers, liable upon a contract for which the city was not primarily liable, and which it was expressly agreed it should not be liable for in any event.* It must be apparent that, if such rule be adopted, such municipalities may become the easy prey of negligent or corrupt councils, and, under the guise and form of local improvements by special assessments, such improvements may be made in such localities as favoritism or other motive may direct, and the feigned or actual neglect or obstinacy of the official representatives of the municipality place upon the city the entire burden of the cost thereof."

IV.

A recovery cannot be had on the theory that the tax bills as issued constitute in effect the certificates required by law. To permit it would be to ignore the distinction made by the plain provisions of the law, which otherwise is useless verbiage, with no purpose or meaning. The distinction is material.

The tax bill recites that the real estate in question (describing it) "has been charged with the sum of * * * the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land * * * as a lien against said land for a peroid of one (1) year after the last installment," etc.

This is issued as a charge against certain land; and it is enforced by special execution against the particular tract named (Charter, Art. IX, Sec. 18), and not by a general judgment against the owner of the land.

The *certification* contemplated by the Charter, on the other hand, is a finding—a formal finding by the Board (which would be a matter of record on its minutes) that it had "ascertained" that the property was city property not used as a street, and the proper amount due by the city on account thereof.

Plaintiff in error, indeed, recognized its inability to recover on this theory, and did not frame its petition (so far as it is possible to determine from reading it just what theory it had in mind), so as to cover it, nor try the case according to it, nor was the city called upon to defend upon such a theory.

V.

And as the judgment will not stand as being one on the tax-bills proper, so also it cannot stand as being based on ANY theory of contract.

The following constitutional provision and statute were at the time of the facts now in controversy and are still in force.

> "The General Assembly shall have no power to grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."
>
> Const. of Mo., Art. IV, Sec. 48.

"No county, city, town, village, school township, school district, or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

R. S. Mo., 1909, Sec. 2778.

And the charter of Kansas City under which these proceedings were had provided:

"Neither the Common Council nor any officer of the City, except the comptroller, in a single instance in this charter provided, shall have authority to make any contract or do any act binding Kansas City, or imposing upon said city any liability to pay money until a definite amount of money shall first have been appropriated for the liquidation of all pecuniary liability of said City under said contract, or in consequence of said act; and the amount of said appropriation shall be the maximum limit of the liability of the city under any such contract or in consequence of any such act, and said contract or act shall be *ab initio* null and void as to the city for any other or further liability."

Charter, Art. 4, Sec. 30.

"The City shall in no event nor in any manner whatever be liable for or on account of the cost of work done in constructing, changing, diminishing, enlarging, or extending any district sewer, except as hereinafter provided."

Charter, Art. IX, Sec. 10.

"The Board of Public Works shall, after making out and certifying any special tax bills as aforesaid, in

this article provided for, cause the same to be registered in full in their office and deliver such special tax bills to the party in whose favor made out for collection and take the receipt of such party therefor at the foot of the register *in full of all claims against the city* on account of the work for which such tax bills have been made out."

Charter, Article IX, Sec. 16.

The contract between the City and the Contractor contained these provisions:

"Sec. 12. *General Stipulations*: It is further agreed that the passage of the ordinance herein above referred to and the doing of the work embraced in this contract without any proper petition of the Common Council from the real estate owners to have said work done, shall not render the city liable to pay, directly or indirectly for such work or any part thereof otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills and take the same without recourse against Kansas City in any event."

"Sec. 15: And the said party of the first part further agrees that he will not be entitled to payment for any portion of the aforesaid work or materials, until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction of the City Engineer, and that he will then receive pay according to the above schedule of prices in certified bills of assessments of special taxes against and upon the lands in said sewer district, as provided by law, and that his receipt therefor shall be in full of all claims against the city on account of said work." (Transcript of Record, pp. 11-12).

The contract merely emphasized the provisions of the charter, which would have been read into the contract and been binding upon the contractor, even if not expressed.

Before the bills sued on were received, Walsh, in ac-

cordance with the charter provisions and his contract, relieved the city from all claims against it on account of the sewer work.

The receipt of the contractor introduced in evidence herein is as follows (Transcript of Record, p. 26):

> "Received this day the above mentioned special tax bills amounting to the sum of $71,521.32, in full for work done on sewer constructed in the above named district and of all claims against Kansas City on account of the above mentioned work.
>
> MICHAEL WALSH, *Contractor.*"

The receipt was not only a release in itself; it was also evidence that the law had been complied with; and the law then, without the aid of the receipt, released the city. The receipt was the contractor's formal acknowledgment thereof.

The cases cited by respondent against this proposition are distinguishable in their facts from the case at bar.

The case of *Barber etc. Company* v. *City of Harrisburg*, 64 Fed., 283, was one where the city let a contract for street paving and agreed to pay therefor out of assessments to be levied, etc., and to assign to plaintiff all unpaid assessments with the right to sue thereon in the city's name.

The Supreme Court later declared the act, under which such assessments might be levied, to be invalid. On this state of facts the court held the city liable *on the contract.*

> "It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that the 'city shall not be otherwise liable whether the assessments be collectible or not.' Omitting the language just quoted, there could be no doubt of the defendant's liability. The case would be identical, in all respects, with *Hitchcock* v. *Galveston*, 96 U. S., 341. The langauge quoted does not, however, we think, add anything to the force or effect

of that which precedes it. It simply expresses what would be implied in its absence. The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged *its entire obligation*, just as it would in the present case. This, however, it has not done."

In the case of *Barber etc., Co.* v. *City of Denver*, 72 Fed., 336, the city let plaintiff a contract for paving a street for a definite sum, part to be paid by the street railway company. The company sued *on the contract*. The court (l. c. 338) said:

> "The city has discharged the obligation imposed upon it by the contract, with this exception: that it has not caused, or attempted to cause, the street railway company to pay the paving company the $4,169.16, which it contracted that they should pay to it; and it refuses to pay this amount itself, or to take any steps to cause the railway companies to pay it. Why is this not a good cause of action?"

The court then goes on to discuss the question and in holding the city primarily liable *on the contract* under the facts of the case, cites the foregoing Harrisburg case, among others, as an authority.

In the case cited of *Oster* v. *City of Jefferson*, 57 Mo. App., 485, the city let a contract with plaintiff for certain paving.

> "The plaintiff *sued the defendant city for the contract price* of doing certain macadamizing, curbing and guttering * * * after the work was completed the city clerk made out and delivered to the contractor certain alleged tax bills purporting to charge the property abutting on the street; that these were admittedly in-

valid and worthless, and that on their return to the city clerk an effort was made to amend these and others were issued; but the second lot, too, were objected to and returned as worthless. The city authorities did nothing further. Plaintiff demanded payment from the city, which was refused, and this action was brought in April, 1891, * * * There is no provision in this law of 1887, which we have been able to find, that authorizes the issuance of special tax bills to the contractor doing the work or limits the liability of the city to the mere execution and delivery of such unauthorized tax bills. * * * He agreed with the defendant city for a special price to macadamize a certain street according to certain plans and specifications. It is admitted that he did this, and completed his work in the fall of 1887, and to the entire satisfaction of the defendant. For this the city is under a legal obligation to compensate the plaintiff. To procure a fund for this purpose the municipality was authorized to assess and collect the necessary amount from the abutting property owners. That it has failed to do so is no fault of the plaintiff."

In *Fisher* v. *City of St. Louis*, 44 Mo., 482, we quote from the opinion:

"The plaintiff performed the service contemplated by the contract, and received, as in payment, certain tax bills, which proved to be invalid, uncollectible and worthless, having been issued without competent legal authority. This *suit is brought to recover the contract price* of the work, accompanied with an offer to surrender the tax bills, which are alleged to be illegal and void. * * *

We think the action well brought. The plaintiff had rendered the stipulated service, and was entitled to compensation. If he had not been paid, it was his right to sue for the value of the work."

The case of *Ft. Dodge Electric Light and Power Company* v. *City of Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7, quoted

at length by plaintiff in error, was one where the court held the city liable for the amount of a *void* tax bill, when it might have issued proper ones.

In the course of its decision the court said:

> "This is not a case where the city undertook to do something which it could not do, and which the party contracting with it was bound, as a matter of law, to know it could not do." (Plaintiff's Brief, p. 28.)

But putting aside the question of the express limitations on the city's liability in the case at bar, under the Constitution, the Statutes, the Charter and the contract, it is sufficient to say that in the present case plaintiff repudiates the theory that the tax bills issued were void, or even voidable and makes its arguments straightly on the theory that they were valid, but that the city afterward made them uncollectible. Whatever the decision as to whether or not the city would be liable in tort for such action, the case cited has no relevancy, being decided on the entirely different premise of an unperformed contract.

It is noticeable that in all these cases one or more of three conditions were present. *First,* that the city agreed to pay a definite sum, but merely recited that it proposed to itself raise the sum in a certain manner by assessment; and *second,* that the limitation of the city's liability was not explicit; or *third,* that the supposed power of the city to levy the proposed assessment was absolutely void. And, moreover, *in each case the suit was not on the alleged tax bills,* but on the contract itself for the value of the work.

In the case at bar, plaintiff sues, moreover, *not* on the contract for the value of the work, but (so far as its action is based on any claim of contractual liability), on the *tax bills.* Indeed, plaintiff's whole standing in court rests upon its being assignee of the *tax bills.* It cannot, and does not, sue on the contract, to which it was not a party.

The point was settled by the Missouri Supreme Court in the recent case of *Cotter* v. *Kansas City*, 251 Mo., 224. There the city of Westport (whose obligations Kansas City assumed upon annexation) let a contract for sewer construction. The ordinance and contract both provided special tax bills should be issued in payment and constitute the only source of payment. The law authorizing a city of the class of Westport to issue such tax bills was later declared void, and suit was then brought against Kansas City *on the contract*. In sustaining a demurrer to the petition, this court, speaking through Roy, C., said:

> "We appreciate the hardships of this case. At the same time we call attention to the fact that both parties to the contract acted in apparent good faith. Both contemplated the possibility that the special tax bills might be invalid; and it was mutually agreed that the city should in no event be liable. The city, under the statute, cannot be held without a contract to that effect, and that contract must be in writing."

The contract (Transcript, pp. 11-12), the charter provisions (Art. IX, Sec. 10, and Art. IV, Sec. 30; *Ante*, p. 14 and p. 28), and the Constitution (Art. IV, Sec. 48) and Laws (R. S., 1909, p. 2778) of the state, (*Ante*, p. 28) all negative the liability of the city on any theory of contract. The Missouri Supreme Court in its opinion, aptly says:

> "It follows from a consideration of all the above prohibitions that no liability for the tax bills, or for the payment of the money therein mentioned and which is based in anywise upon contract, could possibly arise against the defendant upon any view." (Transcript of Record, p. 49.)

VI.

The city is not estopped to deny its liability under the tax-bills.

Plaintiff in error cites numerous authorities to sustain its contention that the city is estopped to deny the validity of the tax bills. As hereinbefore suggested, whether the bills were valid or not would not change the result, as respondent has failed to preserve its rights under any theory. But the cases cited are not applicable even on the point concerning which they cited. They go to situations where public officers have acted in the manner and form prescribed by law, in the course of their duty, but by reason of matters *in pais* it was sought to invalidate their acts, and the courts have nevertheless held them valid. But in the case at bar the City is not seeking to repudiate matters done in due course by "duly authorized officers;" but rather it denies the right to have one act, viz., the issuance of a tax bill, construed into being another inconsistent act, to-wit, an ascertainment and certification which implies a situation where tax bills are expressly forbidden.

And whether the Board acted with or without actual knowledge (the bills appear of record as signed by a deputy) is immaterial. The Board was absolutely and expressly forbidden, and therefore was powerless, to bind the City by a tax bill."

Nor are the cases cited under sub-head IV of its brief (pp. 20-22) applicable to the issue. The construction put by the members of the Board of Public Works upon the question of the liability of the lots in question to special tax bills, could not prevail as against a proper interpretation of the law while the matter remained in a situation where it could be corrected, as it could have been done here (by *mandamus*, if necessary.) And even in the cases cited, the rule of construction insisted upon is confined to cases where

it is "not manifestly erroneous, and which wrongs no one." (*Port Huron* v. *McCall*, 46 Mich., 565, cited in plaintiff's brief, p. 21.)

In the instant case it would manifestly wrong the public as a whole, who pay the taxes from which a general judgment must be paid, to subject the city to such a general judgment, for the benefit of a limited district within which the work for which the bill was issued was done. The wrong is well stated by Judge Dillon in the paragraph quoted in the Pontiac case, cited *ante* p. 24, and by the Supreme Court of Missouri in its decision in this case, when it said:

> "The logic of the situation manifestly suggests the rule that all taxpayers of a city ought not to be taxed for the default of the city to properly levy a special improvement tax against the property of an infinitesimal part, (*e. g.*, a sewer district), of such city. (1 Dillon, Munic. Corp., Sec. 482; 1 Elliott Roads and Streets, Sec. 657.)"
>
> (Transcript of Record, p. 50).

And even if the interpretation claimed were correct, (that the land was private property, subject to tax bills) then as we have heretofore shown, the present judgment could not stand (See III *ante*).

It is not correct, as stated in brief of plaintiff in error (p. 22, end of sub-head IV) that defendant in error "now claims that by that act it has destroyed plaintiff's remedy and yet should not pay the loss."

The only "act" of Kansas City after the issuance of the bills was in accepting as final the decision of the Supreme Court sustaining the condemnation judgment theretofore pending before it. If the tax bills were then good, they remained good; if not, then no "act" of Kansas City is responsible.

VII.

The judgment cannot stand on any theory of tort.

Plaintiff in error is driven, therefore, to base its demand upon a roundabout theory that the first method of paying for the work was the true one viz,. that the land was private property, and that the tax bills when issued were a proper and valid lien thereon. And then, realizing that it has failed, for reasons known only to itself, to assert its rights in due time, it now seeks to escape the result of its own neglect or strategy, by somewhat forcibly dragging into the case an alleged tort, the shadowy character of which is indicated by the difficulty encountered in framing an allegation concerning it in the petition.

In the first place, there is no assignment to plaintiff in error of the rights arising out of the tort, if a tort occurred, a fact noted by the Missouri Supreme Court in its opinion (Transcript of Record, p. 19, lines 11-15, p. 49, lines 14-21 and p. 50, lines 4-9, 23-27).

Plaintiff in error says, however, that the tort was to it, and not to the contractor. But the record does not show when plaintiff acquired the bills, and the court cannot supply or assume facts not of record which are necessary to a proof of plaintiff's case.

Moreover, there is no evidence of when the alleged tort occurred. It is with considerable difficulty that one can get out of the petition any allegation of a tort at all. The petition says (Transcript of Record, p. 7):

> "that subsequently to that date Kansas City *paid for* and took possession."

and this is the only allegation of fact upon which to found the claim of tort. *When* this occurred is not shown, nor the manner of taking. (And in passing, if Kansas City "paid for" the land, it stands acquit. To "pay" is to "satisfy;" to "discharge one's obligation to." *Forrest* v.

Henry, 33 Minn., 434, 23 N. W., 848. A petition alleging that the land was "paid for" will not sustain a judgment based on a finding that it was *not* paid for.)

Certainly it was not a tort for Kansas City to acquiesce in the decision of the Supreme Court affirming the condemnation; it was not a tort to "pay for" the land; it was not a tort to adopt a plan of improvement, nor to establish a grade on the highway in question; and we submit that it was not a tort even to go on the land and improve it with the acquiescence (which is not disputed) of the former owner. The holder of a tax bill has no right to control the *possession* of the land. And if any of the foregoing did in fact and law constitute a tort, there is no evidence of the date of it, which would enable the Court to determine who acquired the right of action.

But in truth there was no tort. The only tort referred to in argument (and that without a direct allegation or stating particulars) is that Kansas City in some mysterious way destroyed plaintiff's lien on the land. How it was done is not explained. We have referred above (*Ante*, p. 10) to the authorities cited by plaintiff in error to show not only that the tax bills were valid, but that its property in them and in the lien thereof could not be taken under the constitution without compensation. But as there pointed out, if the city *could* not destroy the lien, then of course it *did not*. That is to say, if the bills were a valid lien on the land ahead of the city's rights therein, then the city would take the land subject to the lien, the rule of *Clinton* v. *Henry County*, 115 Mo., 557, to the effect that a lien cannot be enforced against public property, would not apply, and no act of it would or could destroy the lien. Hence, there could be no tort.

But even in relying on the tort, the petition does not properly present its case. It declares as if on the tax bills, with interest at 10 per cent as provided in the tax bills, but asks and receives judgment generally. Then in argument

and in its assignments of error, it supports this judgment on the theory of a tort. Under a tort the damages would not necessarily be measured by the amount of the face of the tax bills. Plaintiff's Brief (pp. 2-4-14) says the contractor sold the bills to respondent and got "full value" for them. It is not stated that he got *face value* for them, although the distinction between the terms was expressly noted in both the printed and oral arguments in the Missouri Supreme Court; and both plaintiff's name and common knowledge suggest that there is no inference that it paid par for the bills. It is incumbent on the plaintiff, in an action in tort, to show how much it is "out" by the alleged tort.

VIII.

Conclusion.

This case was first decided unanimously by Division 2 of the Supreme Court of Missouri. On motion it was then transferred to the Supreme Court *in banc*, which merely held

> "The foregoing opinion of Faris, P. J., written in Division No. 2, is concurred in and adopted as the opinion of Court *in banc*." (Transcript of Record, p. 52.)

The learned judge who wrote the original opinion first inserted a clause expressive of regret at the condition of the law. Evidently appreciating the injustice and inconsistency of using language which might be construed as criticism of city officials in making a legal decision which he was in the act of deciding was a correct one, the clause in question was stricken out. *That clause was not a part of the opinion as it came from Division No. 2 to the Court in Banc, was*

never before that court and was not a part of that court's opinion.

Plaintiff in error (for the purpose, as its brief discloses, of turning a phrase in its argument) had the clause in question printed into the Transcript of Record and then crossed out; and thereafter quotes it in capital letters in its brief and argument as though properly in the opinion and in the record, although it was not, and never had been a part of the opinion of the Court *in Banc* from which the writ of error was taken.

Whatever the standard of ethics, "palpable" or otherwise, which justifies such dalliance with the record and with this court, the merits of the controversy, as before this court, can be nowise affected thereby, and we do not feel called upon to further notice it; nor to defend the honesty or good faith of a legal position which has been sustained by the Supreme Court of the State, on a question which has been submitted to us purely as one of law.

Plaintiff in error is seeking to impose a liability against the general fund of the city in a manner not provided by law, and expressly prohibited by the Constitution, the Statute, and the Charter, as well as by the contract of the parties.

The city as an entity is an abstraction. The tax paying citizens are the real parties in interest. As such they have provided in their charter that their agents may bind them. But the conditions and limitations of that agency must be strictly adhered to and respected. The terms of that agency were known to plaintiff's assignor. The duty was as much on him to see that they were complied with as it was upon the public whose funds plaintiff now seeks to charge. It was even more on him, because he was present and advised of the proceeding, while the tax-paying citiens, who are the real principals in interest, were not, except as they were represented by agents whose powers they had strictly limited.

The tax-bill system is not a perfect one. In its operation it is often not uniform; e. g., shallow lots are often scarcely worth the amount of the tax bills. In practice it works out that contractors prevent injustice and loss by knowing the facts and bidding accordingly. They, and not the city, much less the private citizens, actually watch the details of this sort.

The fundamental question, from the city's standpoint, is whether the liability of the city to a general judgment can be made to rest, not upon a compliance with the requirements and limitations imposed by law and public policy upon its officers, agents and contractors' but upon the unrestrained determination of any public official that in his opinion a claim should be allowed, notwithstanding to do so would be to make a mockery of the express provisions of the law.

The question at issue is not whether plaintiff, or its assignor, was originally entitled in some form to an amount equal to that represented by the tax bills. It is, rather, whether the city (which means the tax payers at large) can properly be subjected to a general judgment as insurer of the claim when *a proper action, at the proper time, by and against the proper parties*, would have fully decided the respective rights and liabilities of all concerned. If the city is lawfully liable to a general judgment, it stands ready to pay; but it denies not only the duty, but the right, of the city's officers to pay a claim for which it is not legally liable, merely because, by plaintiff's laches, a determination of the proper remedy was not made in due time.

This is an old claim, and one which is duly asserted in the manner prescribed by law might have been found valid. But it does not differ essentially from other cases where claimants, by failure to assert even just claims, have permitted their day of opportunity to pass. The law has placed very explicit restrictions on the powers of public officers, both in the creation and in the allowance of claims against the public treasury on their individual discretion.

It has provided heavy penalties on such officers for the violation of these restrictions. The determination of the City's officers in this case, that payment of respondent's claim would not be justified under the law was properly subject to review and has been fortified and sustained by the decisions of the Supreme Court of Missouri.

We respectfully urge that that decision should be concurred in by this Court and that the writ of error should be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 56.

MUNICIPAL SECURITIES CORPORATION, PLAINTIFF IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

File No. 25019.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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REPLY BRIEF.

I.

The defendant in error argues at length, in effect, in its Proposition III, beginning at page 6 of its Brief, that if the plaintiff's contention to the effect that the tax bills described in the petition were well issued and so fixed a lien upon the private property described in them be correct then the plaintiff had other remedies and therefore should be denied a recovery in this case. And it asserts (a) that plaintiff should have collected the amount of the lien from the award allowed in condemning the tract of land described in the tax bill; or, (b) it should have obtained a special judgment to sell the already condemned land for the $43 lien against

each of these city lots—and so should have confiscated and destroyed the city's public parkway for which the city in this condemnation proceeding had paid something over $365,000.00.

(a) The first defensive suggestion, namely, that the plaintiff should not recover a money judgment because it did not coll its claim from the condemnation award, instead of constituti a defense, is a conclusive ground for the recovery of a money jud ment; for the city had the money to pay that award in its ow possession, and it was its duty to pay the same to the parties lav fully entitled thereto, and it knew all of the plaintiff's claims an rights (if it had any) in and to that award because it had issue the tax bills in question and made them a part of its official records, of which all parties, including the city, were by the City Charter deemed to have notice; and it did nevertheless pay out the amount of those awards to the parties whom it deemed entitled thereto, and did not pay any of them to the plaintiff. About the facts just recited there is no dispute. The court in the condemnation case expressly adjudged that the payment of the amount of those awards "has been respectively and lawfully made to the persons or parties in whose favor judgment therefor has been rendered by this court in these proceedings" (Transcript of Record pp. 24, 25), and none of them were paid to the plaintiff—so, that judgment is conclusive of the fact as against the defendant either that the plaintiff was not entitled to those awards or that the city committed a palpable breach of duty in paying money it held for the plaintiff's use to another.

In *Municipal Securities Corporation* v. *Kansas City*, decided March 5, 1917, by Kansas City of Appeals, not yet officially reported, 193 S. W. 880, 881, the question was directly in decision whether the city was liable to the owner of a special tax bill against lands condemned for a parkway when it, the city, had paid the entire condemnation award to another and left the tax bill unpaid. The trial court held the city liable for the amount of such tax lien and rendered a money judgment therefor against the city. The Appellate Court in affirming the judgment below said:

"Three prominent facts stand out in the record; One, that the plaintiff had the lien; and, second, that defendant appropriated the property on which the lien existed; and, third, that defendant paid out condemnation money to the owners, whose condemned lands it knew were subject to the lien of plaintiff's tax bills, with-

out ever having given plaintiff any notice of its proceedings and of which plaintiff had no knowledge until about six months after the money had been paid."

And the court accordingly affirmed a money judgment against the city for the value of the tax lien.

But the trial court in the case at bar upon sufficient evidence found that the plaintiff was not entitled to be paid from the condemnation awards because the betterment and the added increment of value accruing to the condemned lands by reason of the construction of the sewers occurred subsequently to the date of the determination of the value of those lands by the condemnation jury and the added value was not considered by the jury in fixing the value of those lands to be awarded to the owners who claimed damages, or had a right to damages, at the condemnation trial. This finding is not contested here, nor has it been elsewhere, for want of evidence. The fact was so alleged in the petition and the evidence showed that the sewers were not completed for ten months after the condemnation case was tried. The Missouri Supreme Court in its opinion in this case (now reported as *Municipal Securities Corporation* v. *Kansas City*, 265 Mo. 252) expressly say, after setting out one count of the petition: "This petition, in the view we take of the case, is important, and in connection with the tax bills and the assignment thereof, *is decisive of the case*" (Transcript of Record p. 42). *"The facts are neither contradicted nor disputed.* The dispute is alone upon the legal effect of the facts" (Transcript of Record p. 47).

The trial court in holding that the special tax bills were not payable from the condemnation awards followed the controlling decision of the Missouri courts, namely, In re Paseo, 78 Mo. App. 518, where it is held, as stated in the syllabus:

"Special improvements between the date of the verdict (in a condemnation case) and the date of the payment (of the award) form no part of the value of the land under the assessment of damages, and the tax bills therefor did not constitute a lien before (superior to) the judgment of condemnation and cannot be recouped out of the damages."

The sole question determined in the case of In re Paseo was whether the owners of real property which had been condemned were entitled to the whole amount of the awarded value of those

lands as against the claim of the holder of certain special tax bills issued to pay for public improvements under two contracts, one of which was dated prior to the date of the condemnation ordinance and the other dated subsequently to the date of the condemnation ordinance, which public improvements were not co[illegible] until after the trial of the condemnation case; and it was h[illegible] the persons who were the owners at the time of the trial w[illegible] titled to receive the entire award as against the claims of [illegible] bill holders. That case rules this point according to the opi[illegible] the Missouri Supreme Court in this case. The Supreme Court's opinion declares:

"If we were to follow the case of In re Paseo, *supra*, we must needs hold that no lien attached in favor of Walsh, or his assignees, upon the award made upon the condemnation of the several lots against which the tax bills were issued" (Transcript of Record p. 51).

This opinion does not criticise the doctrine of In re Paseo; it merely holds that this case rides upon another proposition, viz.: that the alleged tax bills were issued against lands that were a highway not subject to such assessments and so are void.

This rule that the tax bills were not collectible from its condemnation awards is in no wise contravened by the case of *Ross* v. *Gates*, 183 Mo. 338, because in that case the distinguishing fact appeared that the improvements for which the tax bills were issued were completed prior to the trial of the condemnation case and the effect of these improvements upon the value of the condemned land was considered by the jury and allowed for in determining the awards to be made in behalf of affected lands, and so it was held in that case, under the circumstances stated, that the amount of the tax bills was properly payable from the condemnation awards.

(b) The defendant asserts that if the plaintiff had good special tax bills at the time they were issued plaintiff was entitled to and should have asked a judgment to sell the land to pay the claim and that having failed to do so it may not have a money judgment. No Missouri decision sustains such a claim. Indeed they hold the contrary doctrine. *Municipal Security Corporation* v. *Kansas City*, (*supra*), 193 S. W. 880; *Barber Asphalt Paving Co.* v. *City of St. Joseph*, 183 Mo. 451. The amount of the tax bill described in the first count being one against a corner city lot was $43.20. It would be curious if litigants and courts would

permit such a lot to be sold for that sum when the effect would be to dismember a public highway and parkway!

A like contention was made by Kansas City in the recent case heretofore referred to (*Municipal Security Corp.* v. *Kansas City*), and that contention was answered by the Kansas City Court of Appeals in affirming a money judgment as follows:

"It is not necessary to inquire what other remedy or remedies plaintiff may or may not have, as long as the one it has elected to pursue rightfully belongs to it and upon every just and legal principle affords relief."

It must always be remembered that the special tax bill is a form or method of evidencing and enforcing a tax or special assessment against private lands—taxable lands, and not a device for confiscating public lands. It is quite clear that the Kansas City Charter does not contemplate that a tax bill should ever be issued or enforced against public property of the city, the title to which is held by Kansas City.

Kansas City Charter, Sec. 10, Art. 9; Sec. 14, Art. 9.
These charter provisions are set out on pp. 4 and 5 of the Primary Brief for Plaintiff in Error.

And it is contrary to the established public policy of the state that property held by a municipality for public use and which has been improved and developed by the application of public money to adapt it to such public use shall be sold under execution. Even general judgments against a city may not be enforced by execution against public property.

R. S. Mo., 1909, Sec. 2181.

And in *Clinton* v. *Henry County*, 115 Mo. 557, 568, cited in our original brief, it is expressly ruled:

"Property owned by a county or other municipal corporation and used for public purposes cannot be sold on execution. It is against public policy to permit such property to be sold."

And it is a principle of general law that a personal judgment may be recovered against the wrong-doer for the amount of liens on real property which have been interfered with or rendered unenforcible by him.

Wilson v. *European and North American Railway Company*, 67 Maine, 358, was an action in trespass brought by a mortgagee

for money damages. The land covered by the plaintiff's mortgage had been condemned by the defendant in a judicial proceeding for its right of way and the award therefor had been paid to the mortgagor. The court in sustaining the action say:

"We have no doubt the mortgagee might resort to [illegible] ings in chancery to recover the damages awarded to the mor[illegible] But the railroad corporation must see that the mortgagee i[illegible] how paid or satisfied for the land taken so far as covered [illegible] mortgage. In this case, at this lapse of time, this actio[illegible] the remedy the plaintiff can have; and his claim for damage[illegible] not be defeated. The taking of the land was legal; the damages for such taking are recoverable in trespass."

Borough of New York v. *Welsh*, 117 Pa. St. 174, 11, Atl. 390, was an action in debt. The plaintiff was a widow having a dower interest in certain land. That land was condemned by the Borough through a judicial proceeding for a public street. The widow was not made a party to that proceeding. In the statement of facts by the court it is said:

"This action of debt was brought against the defendant to enforce the payment of said annual dower interest payable to widow under the decree of the orphans' court. It was contended by the defendant that it paid to Augustus E. Fahs the full value of the entire lot, including the dower charged upon it, and that the borough is not liable to Mrs. Welsh for the arrears of interest; that she must look to Fahs, who got the money, for her annual payments, or if not him, to Zaccheus H. Welsh, who took the ground in the partition subject to this payment."

The judgment below was for the plaintiff and that judgment was affirmed by the Supreme Court of Pennsylvania, and in the opinion by Greene, J., it is said:

"It was undoubtedly the fault of the defendant that the estate of Mrs. Welsh in the land in question was not discovered, and provided for in the proceedings to assess the damages. Her title was fully spread upon the record of the orphans' court in the proceedings in partition, and there was not the slightest reason for overlooking it, and disregarding her interests in the assessment of damages. The culpability in this respect was increased by the consideration that the damages were finally adjusted by private agreement, and the execution of a release from the owner to the borough. * * * The borough has taken the whole of the land, and occupied it for the purpose of a public highway. The right of distress cannot be exercised since there is nothing to distrain. The land cannot be sold, since it has been devoted to public use by the lawful exercise

of the right of eminent domain, and no private estate in it can be granted. * * * She is plainly entitled to her interest upon the dower fund, and by the words of the statute she has a right to have it from the original acceptor or his assigns holding the same. The defendant is clearly an assign of the acceptor, and as such, liable to pay this dower interest. That interest may be recovered [illegible] listress or otherwise, as rents in this commonwealth are re[illegible]rable,' and as debt will lie to recover rent, and the defendant deprived the plaintiff of the remedy by distress, we see no [illegible]ble reason why the present action cannot be maintained. Judg[illegible] affirmed."

II.

On page 14, *et seq., of* defendant's Statement and Brief, it is argued that the tax bills in question were not tax bills because the lands charged by them when the tax bills were issued were not "lots of land within the district" as that phrase is used in Section 10, Article 9 of the City Charter, but were lots of land held by the city and "used as a street, avenue, alley or public highway," which under Section 14, Article 9 of the Charter are exempt from assessments. And the State Supreme Court turned this case by arriving at a similar conclusion as *a legal fiction* and contrary to the fact, as is evident from the opinion wherein it is said that the condemnation proceedings "had the effect to convert these *lots of private persons* into integral parts of the highway or street system of Kansas City" (Transcript of Record p. 49).

When did that change take place? Not, under the Missouri State Constitution and all previous decisions of Missouri courts, until the condemnation money was paid to those "private persons" for those lots, which was eighteen months after the contractor got his tax bills. The contractor was, under the terms of his contract and the Kansas City Charter, which was a part of his contract, entitled, when he completed his work, to special tax liens against certain described lands; and the tracts covered by the tax bills in suit were among such described lots; the city by its express declarations both on the face of the tax bills and on its public records solemnly declared that those lots were such assessable lots; and the city got a written discharge of its obligation to make payment of the contract price of the sewers on the faith of the declaration that those lots were the "lots of private persons" liable to such assessments. And so, under such circumstances, this court, in the

light of the constitutional guaranties of private rights, must be driven to the conclusion that as between Kansas City and the tax bill holder the lots described in the tax bills were assessable lots when the tax bills were issued and that these pieces of paper labeled "Tax Bills" were tax bills when issued, and were therefore property which is entitled under the Federal Constitution to protection against the assaults of state.

The city in the part of the argument just referred to takes the position that these were not tax bills at all. But on page 30 of the same brief it is claimed that the release given by the contractor is a complete defense to this action: That release reads in part as follows: "Received this day the above mentioned *special tax bills* amounting to the sum of $71,521.32 in full for work done on sewer," etc., and the identical tax bills sued on are among those "above mentioned."

And the argument continues: "The receipt was not only a release in itself; it was also evidence that *the law had been complied with*; and the law then, without the aid of the receipt, released the city."

It is a strange mental process that will permit the serious statement at one place that certain documents *were* special tax bills, and at another that the same documents *were not*. They were "tax bills" for the purpose of discharging the city's obligation to West, the contractor, they are now *not* "tax bills" when to be such would require that Kansas City pay the value of them! If such acrobatic feats of conscience are justifiable we sympathize with the writer of the learned opinion of Division Two of the State Supreme Court when he said: "We deprecate the palpable dishonesty such a condition of the law permits to be perpetrated."

III.

Defendants' brief, at p. 41, in summing up the matter declares:

"The question at issue is * * * whether the city (which means the tax payers at large) can properly be subjected to a general judgment as insurer of the claim when a proper action, at the proper time, by and against the proper parties, would have fully decided the respective rights and liabilities of all concerned."

Does defendant mean by the phrase "a proper action at a proper time," that the contractor should have sought by mandamus to compel the Board of Public Works to omit the lots in ques-

tion from assessment and to increase, by the amounts those lots should bear, the assessments to be laid on other lots in the district? If it does, we say that that relief would not have been awarded because it flies in the face of the plain charter requirech requires that all "lots" in the sewer district at the time is completed and accepted be charged. The burden these ould bear could not under the City Charter be loaded on shoulders. The question had to be decided then, and at .... the lots in question were lots owned by private persons and were no part of a street or parkway. If he means that this suit was not brought within the time that a suit to enforce the lien of the special tax bills under the City Charter should be brought he is mistaken. The time for bringing suit to enforce that lien expired May 31, 1905, and this suit was instituted on May 29, 1905. There is nothing in the claim that a notice of the suit was not filed with the city treasurer according to the charter provision in that respect, because under that provision the notice is not required to be filed until ten days after the suit is brought; its purpose being to give notice to subsequent purchasers or persons interested of the time and place where the suit is brought. The facts relative to the giving of such notice, therefore, are not part of plaintiff's cause of action and accordingly are not required to be stated in the petition. No defense of that character is plead or proven. Therefore it is not an issuable fact whether such a notice was given or not. The presumption arises that it was given in the absence of any assertion to the contrary.

If it is claimed that any other party than Kansas City was a necessary party to a suit to enforce the alleged lien it is likewise mistaken because the record shows that the right, title and interest of all parties in the lands in question, except that of plaintiff, was extinguished by Kansas City by the judicial transfer of those titles to Kansas City.

We again submit that Kansas City cannot for value issue a security and then voluntarily destroy its value—take it away—without making restitution; and that the judgment of the Supreme Court of Missouri should be reversed and that of the Circuit Court of Jackson County should be affirmed.

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Attorneys for Plaintiff in Error.

MUNICIPAL SECURITIES CORPORATION *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 56. Argued November 15, 16, 1917.—Decided March 4, 1918.

If the decision of the state court rests upon a ground of general law adequate to support it, independently of the decision upon alleged violation of federal right, the case is not reviewable here.

So *held*, where the plaintiff, as assignee of special tax bills issued by a city in payment for sewer construction, claimed that, by appropriating a certain lot in the sewer district through condemnation proceedings and by thus preventing the lien of the tax bills from attaching thereto, the city took property without due process and so rendered itself liable, whereas the state court, construing the sewer contract, the city ordinance and charter and state constitution and laws, held that there could be no recovery against the city on the tax bills themselves, and that the cause of action, if any, for the alleged wrongful taking, was a separate matter not covered by the assignment.

Writ of error to review 265 Missouri, 252, dismissed.

THE case is stated in the opinion.

Mr. William C. Scarritt, with whom *Mr. Elliott H. Jones* and *Mr. Charles M. Miller* were on the briefs, for plaintiff in error.

Mr. A. F. Smith, with whom *Mr. J. A. Harzfeld* and *Mr. Jay M. Lee* were on the briefs, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error brought suit in the Circuit Court of Jackson County, Missouri, to recover on certain tax bills issued to one Michael Walsh, its assignor, for the

construction of a sewer in Kansas City, Missouri. The case was tried on an amended petition and answer. The amended petition was filed on May, 20, 1909, but it is said the suit was begun on May 29, 1906. The amended petition set out that by an ordinance approved January 24, 1901, Kansas City provided a sewer district, and let a contract for the construction of the sewer to Walsh. That Walsh constructed the sewer, and was paid for the work by special tax bills against sewer district number 146 in Kansas City. That Lot one, Block one, C. H. Pratt's Vine Street Addition, is located in said sewer district, and that at the time the work was done and the tax bills issued the owner of said property held the same subject to certain proceedings to condemn said lot for a public parkway in the South Park District of Kansas City established by an ordinance approved October 3, 1899; that said parkway ordinance ordered that said Lot one, Block one and other property should be condemned for the purpose of a public parkway, and proceedings were begun in the Circuit Court of Jackson County, Missouri, for the condemnation of the lot for that purpose; that the condemnation proceedings were carried to judgment in the Circuit Court of Jackson County, Missouri, wherein a verdict had been rendered for the value of the property on June 4, 1901, that the verdict was duly affirmed, and judgment rendered on September 14, 1901, in the Circuit Court. Upon appeal to the Supreme Court of Missouri said judgment was suspended until affirmed by the Supreme Court, June 4, 1902, and that after that date the city paid for and took possession of said Lot one, Block one, Pratt's Vine Street Addition, and now is holding the same for a public park. Plaintiff further alleges that, while the condemnation proceedings were pending in the Supreme Court, Walsh completed the work, and that tax bills therefor were issued to him on March 15, 1902, chargeable in payment of the appropriate share of the cost of the sewer upon the lot above

described. The plaintiff alleges that Walsh sold and assigned the certificates or special tax bills to it; that by reason of the condemnation proceedings and the judgment therein the tax bill never became a lien upon the lot, above described, and that upon a final determination of said condemnation case Kansas City was liable to pay the amount of said tax bill with interest, and that the city cannot by an act of itself, not consented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy plaintiff's right to collect the cost of the said work in accordance with the contract mentioned; the plaintiff invokes the Fourteenth Amendment of the Constitution of the United States guaranteeing the protection of its property by due process of law as against the acts of States. Plaintiff alleges that before the beginning of the suit it offered to surrender to the Board of Public Works of Kansas City the tax bills issued as aforesaid, and to accept a certificate as provided in the city charter in lieu thereof, if the Board should hold that the said certificates or tax bills were not certificates conformable to the provisions of the charter of Kansas City, but the Board refused to accept the same or to issue a new certificate, and denied all liability for the said charge.

The city answered the amended petition, and stated therein that on March 15, 1902, it did issue special tax bills to Michael Walsh as set out in the petition; and that Walsh on March 15, 1902, executed and delivered to Kansas City a full and complete release on account of any claim arising on said tax bills as provided in § 16, Article 9, of the charter of Kansas City. The answer further sets up that the charter of Kansas City provides a method by which the city shall pay its share of any public improvement on land owned in fee by it; that no certificate was issued by the city on the lot in question or any other lots described in the petition; and that it was not found that the lots mentioned in the petition were owned in fee sim-

ple by the city; that there was no compliance with the charter of the city, and no obligation created thereunder.

At the trial the tax bills sued upon were introduced, indorsed as follows: "Assignment. For value received —— assign this Special Tax Bill and the lien thereof to Municipal Securities Corporation, and —— authorize to sign — name — to the receipt. Michael Walsh."

The record does not disclose when this assignment was made, and it bears no date.

Upon trial in the Circuit Court the court held as a matter of law that Kansas City was an agency of the State of Missouri, and had by its official acts, ordinances and conduct appropriated to the public use the property and property rights of the plaintiff consisting of valid and subsisting liens upon certain real estate without making just compensation, or any compensation therefor, and thereby deprived the plaintiff of its property without due process of law contrary to the Fourteenth Amendment and contrary to the bill of rights of the State of Missouri, and rendered judgment for the plaintiff.

The case being taken to the Supreme Court of Missouri the judgment of the Circuit Court was reversed (265 Missouri, 252), and the case was brought to this court because of an alleged violation of the protection afforded by the Fourteenth Amendment as the result of the alleged wrongful appropriation of the plaintiff's property. The Supreme Court of Missouri after reciting the facts, held that the suit was upon the tax bills, that as Walsh's agreement with the city and the ordinance itself provided that the city should not be liable to pay for the work or any part thereof otherwise than by the issue of special tax bills, and because the charter of the city provided that the city should in no event or in any manner be liable for or on account of the work done in constructing the sewer, but that the work should be paid for in special tax bills which would be a lien on the property described in them,

and that under the Constitution of Missouri and the statutes of that State the use of municipal funds in the payment of tax bills was absolutely forbidden, there could be no recovery upon them, and in so far as recovery was sought because of the asserted conversion or destruction of the lien of the tax bills, the judgment for the plaintiff could not stand. Concerning this feature of the case the court said:

"The suit here is upon a tax bill in some aspects and upon a tort as for conversion in others. The petition is *sui generis*, being possibly what is meant by learned counsel for plaintiff when they say of it in their brief that it is 'typical in form.'

"We need not consider whether a recovery could have been had upon tort, as for the alleged conversion, or destruction, of the property upon which ordinarily the lien of the tax bills would have been fixed. *The assignment is not of the tort, nor of the contract, nor of the right to recover upon a quantum meruit, but of the tax bill pure and simple*, for it says: 'For value received —— *assign this special tax bill and the lien thereof* to Municipal Securities Corporation,' etc. The lien assigned was upon the lots and not against defendant; but the law is fairly well settled that the title of the city to these lots for use as a street attached by relation back under the facts here to the date of the judgment confirming the verdict of the jury, to-wit, September 14, 1901, a date long prior to the issuing of the tax bills, which were issued March 15, 1902. (*In re Paseo*, 78 Mo. App. 518.) The best that can be said for plaintiff's insistence touching this lien is that the lien of the tax bills attached conditionally to these lots; the condition of attachment being that the defendant would dismiss its condemnation case short of final judgment and payment of the money into court, as under the general law, absent a charter provision forbidding, it had the right to do. (*State ex rel.* v. *Fort*, 180 Missouri, 97; *Rail-*

road v. *Second Street Imp. Co.*, 256 Missouri, l. c. 407.) The city did not so dismiss the proceeding and the right of the city, temporarily suspended, as we may express it, by the appeal, attached upon the affirmance here of the judgment of condemnation as of the date of such judgment (*In re Paseo, supra*), and had the effect to convert these lots of private persons into integral parts of the highway, or street system of Kansas City, and to take them out of the category of property of private persons upon which liens of tax bills would attach; but since these lots became parts of public highways the judgment condemning them did not have the effect of converting them into that class of city property, the sewering of which created a liability against the city for which certificates evidencing such liability against the city were issuable by charter. (Sec. 14, Art. 9, Charter of Kansas City, 1898.)

"If Walsh himself had sued for the tort of conversion alleged in effect by the briefs and contentions of counsel for plaintiff, a different and much more serious question would confront us; but it seems idle to insist that upon the petition here and upon the assignment above quoted, that plaintiff may recover upon the theory of tort. We have seen already how futile and idle is the view that plaintiff may recover upon contract. Moreover, no such tort is assigned. Nothing is assigned but the tax bill and the lien thereof. . . . But be this as may be, the point of peculiarity in the instant case that plaintiff cannot in any event recover upon any theory of contract, but that it must recover, if at all, upon the theory of liquidated compensation for a tort, which tort was not assigned to it and on which it does not sue, destroys in our view any helpful analogy between the above cases from other jurisdictions and this one at bar."

As the matter above extracted from the opinion of the Supreme Court of Missouri shows, that court held the

action to be on the assigned tax bills, and that if Walsh might have maintained a suit because of the wrongful taking of the property as alleged, nothing was assigned to the plaintiff in error but the tax bills and the lien thereof; and that the plaintiff could not maintain this action as one in tort because it did not appear to be the assignee of such right of action if one existed. It therefore follows that the Missouri Supreme Court rested its decision upon a ground of general law adequate to support it, independently of the decision upon alleged violation of federal right under the Fourteenth Amendment. In that situation it is well settled that a case from a state court is not reviewable here. *Wood* v. *Chesborough*, 228 U. S. 672; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596; *Giles* v. *Teasley*, 193 U. S. 146.

It follows that the writ of error must be dismissed for want of jurisdiction, and it is

So ordered.